Supreme Court, U.S.
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No. 01-1181

In The Supreme Court of the United States

SHARON GERNETZKE, *et al.*,

Petitioners,

V.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the requirement of a "custom, policy or practice" announced in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) applies to an action brought against a governmental official for prospective injunctive relief only?

2. Whether, pursuant to 42 U.S.C. §1983, governmental entities may be held liable under a *respondeat superior* theory of liability for violations of constitutional and statutory rights when their employees make decisions the entity authorizes them to make?

3. Whether the terms "order and discipline" found in Section 4071(f) of the Equal Access Act incorporate a "heckler's veto" into the Act and thereby allow school officials to censor a noncurriculum-related student club because other students may disagree with the message conveyed by the club?

4. Whether the term "meeting" in the Equal Access Act is limited only to spatial meetings or is broad enough to encompass all rights and privileges given to other secular student-initiated noncurriculum-related clubs?

PARTIES

The Petitioners consist of students of George N. Tremper High School and members of the Trojans Loving Christ ("TLC") Bible Club at George N. Tremper High School, and they include the following: Sharon Gernetzke and Joseph Bezotte, by and through his parent and guardian Doreen Bezotte.

The Respondents include the Kenosha Unified School District No. 1, Dr. Michael Johnson, in his official capacity as Superintendent of the Kenosha Unified School District No. 1, and Dr. Chester Pulaski, in his official capacity as Principal of George N. Tremper High School.

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OPINIONS BELOW

The opinion of the Court of Appeals (App., 1a - 9a) is reported at 274 F.3d 464. The opinion of the District Court (App., 10a - 35a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was filed on December 14, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY PROVISIONS AND POLICIES INVOLVED

This case raises issues involving the First Amendment Free Speech Clause and the Fourteenth Amendment to the United States Constitution

The relevant provisions of 20 U.S.C. §§4071-4074 (the "Equal Access Act") are set forth in the Appendix, 36a - 39a.

The relevant Policies and Regulations of the Kenosha Unified School District No. 1 are set forth in the Appendix, 40a - 47a.

STATEMENT OF THE CASE

In 1998, Principal Chester Pulaski designated certain walls within the George N. Tremper High School for student clubs (including noncurriculum-related clubs) to paint murals regarding their club. After becoming aware of the decision by Principal Pulaski to allow student clubs to paint murals on the walls, the Bible Club at Tremper High School, also called Trojans Loving Christ ("TLC"), received permission to paint a mural and began to design their mural during the 1998-1999 school year. The design

for the mural contained a heart, two doves, praying hands, an open Bible with the Scripture text of John 3:16 and a cross. Principal Pulaski required the Bible Club to submit a sketch of the mural to him prior to painting it on the wall. The Club submitted the mural sketch to Principal Pulaski who approved of the design except for the cross and required the students to refrain from painting the cross on the mural.

Principal Pulaski denied the design of the mural containing the cross because he believed that the cross violated "the line between church and state within the schoolhouse," and because the "cross is a recognized symbol of Christianity."

The Bible Club is one of approximately forty-two clubs on the campus of Tremper High School. A number of the clubs, including the Bible Club, are non-curriculum related clubs. The Bible Club, German Club, French Club, International Club, Spanish Club, Students Against Drunk Driving, New Voice Radio, Soccer Tremper, Varsity Club, Home Court and the Girl's Track Team painted murals at Tremper. The only other mural design denied by Principal Pulaski was that of the Students Against Drunk Driving (S.A.D.D.) club. That club wanted to paint a mural containing a beer can with the words "Bud" or "Budweiser" on it. Principal Pulaski would not allow S.A.D.D. to put the words "Bud" or "Budweiser" on the can. He stated that his denial of the placement of words on the can was related to advertising a beer or alcohol product at the school. Principal Pulaski ultimately allowed S.A.D.D. to paint a can on the mural with no words on it.

In the Fall of 1999, Sharon Gernetzke, a member of the Bible Club, asked Principal Pulaski if she could distribute religious literature on campus to willing recipients during non-instructional time. Principal Pulaski denied her request largely because the literature was religious. Principal Pulaski stated that Ms. Gernetzke could only distribute literature off campus across the

street.

Kenosha School District has enacted several different policies that attempt to regulate literature distribution in the schools. School Board Policy (hereafter "Policy") 2210 states that the Principal of each school is the chief administrative and instructional officer of the school. *See* (App., 40a - 41a). Policy 2440 states that in the absence of a school district policy, the Superintendent or the Superintendent's designee has the authority to use professional judgment. *See* (App., 42a). Policy 5126.8 states that distribution literature materials for students must first be screened and approved by the Superintendent or the Superintendent's designee. *See* (App., 43a). Policy 6161.12 addresses use of free material which may be accepted for classroom use. *See* (App., 44a). Policy 8515 grants the authority to formulate an administrative regulation and to adopt a rule or practice where a policy is absent. *See* (App., 45a). Document 402 is an administrative guideline for sending bulk material through the school mail system. *See* (App., 46a-47a).

The Principal at each school, and particularly Dr. Chester Pulaski at Tremper High School, is the Superintendent's designee having authority to approve or disapprove the students' requests to distribute literature on campus. Students desiring to distribute literature on campus must first receive permission from the Superintendent, but the Superintendent has designated that authority to the Principal of each school. Superintendent Johnson is familiar with Mr. Pulaski's review procedure and practice regarding the distribution of literature by students, agrees with the practice, and further agrees with Mr. Pulaski's decision to deny Plaintiffs' request to distribute literature on the basis that the literature is religious.

Plaintiffs filed a lawsuit on February 3, 2000, against the Kenosha Unified School District No. 1, Principal Chester Pulaski,

in his official capacity as Principal of George N. Tremper High School, and Michael Johnson, in his official capacity as Superintendent of the school district. Plaintiffs sought a Declaratory Judgment, Preliminary and Permanent Injunctive relief and Damages. Plaintiffs alleged that the denial of the mural design with the cross on it was a violation of the Equal Access Act and the First Amendment. Plaintiffs also alleged that the denial of the request to distribute religious literature was a violation of the Free Speech clause of the First Amendment.

Principal Pulaski testified in deposition that he believes that everything the school allows, it automatically endorses. He does not believe that the students in grades nine to twelve are mature enough to differentiate between school expression and club expression. He also believes that if the school allowed the Bible club to put up a Christian cross on the mural, the school would be endorsing religion in violation of the Establishment Clause.

After a period of discovery, both parties filed cross-motions for summary judgment. The District Court denied Plaintiffs' Motion for Summary Judgment and granted Defendants' Motion for Summary Judgment, finding that there was no express custom, policy or practice pertaining to the painting of murals by student clubs, and finding that the Equal Access Act was limited in scope so as to only apply to spatial meetings and not any other rights and privileges enjoyed by other non-curriculum related student clubs. The District Court stated that, "[I]t would strain commonsense for this court to conclude that merely applying paint to a flat wall constitutes a meeting covered by the Equal Access Act." The District Court stated that it was not persuaded "that the Equal Access Act extends to the painting of a cross on a mural in a hallway near a school cafeteria." (App., 34a).

Plaintiffs appealed the District Court's judgment to the Seventh Circuit Court of Appeals. The Seventh Circuit's decision

rejected Plaintiffs' claim that Principal Pulaski acted pursuant to a custom, policy or practice when he denied the cross on the Bible club's mural and denied the literature distribution request. *See Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 467 (7th Cir. 2001); (App., 4a). The Court of Appeals also accepted the "predominant, though not unanimous view ... that *Monell's* holding applies regardless of the nature of the relief sought." *Id.* at 468; (App. 5a). The Court held there was no custom, policy or practice evidenced by Policy 2440 conferring decision-making authority on the Superintendent and his designees. The Court stated that, "The final decision-making authority of the school district is lodged in the district's school board ... School superintendents, principals, and teachers in Wisconsin do not have final authority in this sense, as they would if the Wisconsin legislature had vested the authority to make all decisions concerning school administration in them rather than the school boards." *Id.* at 469; (App. 7a). The Court then reasoned that, "Only the delegation ("conferral" would be a better term) of final authority makes the "delegate" the final authority." *Id.*; (App. 8a).

Additionally, the Seventh Circuit stated that, "The principal's decision to forbid the display of the cross was in any event insulated from liability under the Act by the provision that 'nothing in [the Act] shall be construed to limit the authority of the school ... to maintain order and discipline on school premises.'" *Id.* at 467 (*quoting* 20 U.S.C. §4071(f); App., 3a). The Seventh Circuit recognized that cases from this Court, including *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), forbid a "heckler's veto" under the Free Speech clause of the First Amendment, but the Circuit Court stated, "[T]he 'order and discipline' defense that we just quoted suggests that the [heckler's veto] principle of those cases has not been carried over into the Equal Access Act." *Id.*

The Seventh Circuit affirmed the District Court and denied

Plaintiffs' claims for Injunctive Relief and Damages.

REASONS FOR GRANTING THE PETITION

I.

THE SEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THE NINTH CIRCUIT ON THE ISSUE WHETHER *MONELL'S* REQUIREMENT OF CUSTOM, POLICY OR PRACTICE APPLIES TO SUITS AGAINST GOVERNMENTAL OFFICIALS FOR PROSPECTIVE INJUNCTIVE RELIEF ONLY

The Seventh Circuit's decision conflicts with the decision of the Ninth Circuit Court of Appeals in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989). The issue dividing these Circuit Courts is whether a suit against a governmental official in his or her official capacity for prospective injunctive relief only must meet the requirement of a custom, policy or practice announced in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The Ninth Circuit has reached a divergent result from the Seventh, Fourth, Sixth and Eleventh Circuits.

In *Chaloux*, the plaintiffs sued to challenge the constitutionality of Idaho's postjudgment garnishment procedures. *See Chaloux*, 886 F.2d at 249. The plaintiffs sued the Sheriff of Ada County and the Sheriff of Gooding County in their official capacities only and sought only injunctive and declaratory relief. *Id.* The District Court dismissed the action and the Ninth Circuit reversed stating:

> *Monell* does not apply here. Unlike *Monell*, this case presents *solely* a claim for prospective relief. ... We conclude that the Court did not intend to apply any

> "official policy or custom" requirement to foreclose a suit for prospective relief against a county or its officials for enforcing allegedly unconstitutional state laws.

Id. at 250. The Ninth Circuit reached this conclusion "upon review of the policy justifications supporting the decision in *Monell*." *Id.* The Ninth Circuit concluded that "The *Monell* Court set forth an 'official policy or custom requirement' to limit §1983 *damage* awards against municipalities." *Id.*

The Ninth Circuit stated that, "Neither *Monell* nor its progeny expressed a view as to the circumstances under which solely prospective, as opposed to retrospective, relief might be available." *Id.* at 250. The Ninth Circuit reasoned that "The relief sought here, a declaration that the Idaho statutes are unconstitutional and an injunction against their enforcement, do not carry any threat of fiscal liability." *Id.* at 251. Finally, the Court concluded that "the *Monell* doctrine did not intend to limit the reach of plaintiffs seeking prospective relief under §1983 against the further exercise of governmental authority under an allegedly unconstitutional state statute. The availability of such relief is 'necessary to permit the vindication of important federal rights.'" *Id.* (*quoting Hoohuli v. Ariyoshi*, 741 F.2d 1169, 1176 (9th Cir. 1984)).

In *Los Angeles Protective League v. Gates*, 995 F.2d 1469 (9th Cir. 1993), the Ninth Circuit again applied the rule set forth in *Chaloux* to a case brought by a police officer for dismissal from his job due to his refusal to consent to an administrative search. *Id.* at 1471. The plaintiff named as defendants the City of Los Angeles, various officials of the Los Angeles Police Department and members of the Internal Affairs Division of the Los Angeles Police Department. *Id.* The plaintiff requested relief in the form of reinstatement and pension rights along with backpay and damages. The Ninth Circuit specifically stated that "[T]he City

[of Los Angeles] can be subject to prospective injunctive relief even if the constitutional violation was not the result of an 'official custom or policy.'" *Id.* at 1472 (*citing Chaloux*, 886 F.2d at 247). Significantly, the Ninth Circuit held that the plaintiff's claims for prospective relief were not barred by *Monell* even though he had included additional claims for backpay and damages. *See id.* at 1472 n.1.

Again, in an unreported case, the Ninth Circuit applied the *Chaloux* rule to a case brought by a school police officer who was terminated after it was found he falsified his employment application by omitting a prior criminal conviction. *See Carbella v. Clark Cty. Sch. Dist.*, 141 F.3d 1174 (Table), *available at* 1998 WL 141182 (9th Cir. 1998). The Ninth Circuit acknowledged that, "The district court properly held that the School District, like any municipal defendant, could be held liable for 'prospective injunctive relief even if the constitutional violation was not the result of an 'official custom or policy'" *Id.* at *3 (*quoting Gates*, 995 F.2d at 1472).

It should also be noted that several District Courts have followed the Ninth Circuit's *Chaloux* case in deciding that local government entities may be liable for prospective injunctive relief without a showing that the alleged violation occurred as a result of an official custom or policy. *See Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 363 (S.D.N.Y. 2000); *Nobby Lobby, Inc. v. City of Dallas*, 767 F. Supp. 801, 810 (N.D. Tex. 1991), *aff'd on other grounds*, 970 F.2d 82 (5th Cir. 1992); *Santiago v. Miles*, 774 F. Supp. 775, 792-93 (W.D.N.Y. 1991).

These cases from the Ninth Circuit and other District Courts stand in stark opposition to the present case from the Seventh Circuit. The Seventh Circuit Court in this case acknowledged the split in the Circuits regarding *Monell. See Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468 (7th Cir. 2001);

(App., 1a - 9a). The Circuit Court then went on to affirm the District Court's finding that Plaintiffs had not established a custom, policy or practice of the school district and denied Plaintiffs' sought-after relief, including prospective injunctive relief. In doing so, the Seventh Circuit clearly stands in opposition to the Ninth Circuit's *Chaloux* case and its progeny. Had Plaintiffs been located within the jurisdiction of the Ninth Circuit, the case would have been decided differently, and Plaintiffs would have been entitled to prospective injunctive relief at the very least. A clearer split among the Circuit Courts on an issue is difficult to imagine. The vindication of federal constitutional and statutory rights is too important to be left to the whimsical standard of where one lives. Indeed, it is the importance of those rights that issues a clear call for uniformity among the federal courts on the issue presented. This Court should exercise its discretion to resolve this split.

This is especially true because the Fourth, Sixth and Eleventh Circuits have sided with the Seventh Circuit and stand in conflict with the Ninth Circuit on the extent of application given to *Monell*. In *Greensboro Professional Firefighter Ass'n v. City of Greensboro*, 64 F.3d 962 (4th Cir. 1995), the Fourth Circuit held that plaintiffs were not entitled to relief because they had not proven that their alleged deprivation of rights occurred pursuant to an official custom or policy. *Id.* at 963. The Fourth Circuit acknowledged, "Appellants have also argued that regardless of whether the City is liable under 42 U.S.C. §1983, they are entitled to an injunction to prohibit 'prospective acts of harassment' given the City's 'hostility to associational activity.'" *Id.* at 967 n.6. However, the Fourth Circuit rejected that claim, stating, "Because appellants have failed to establish municipal liability, however, appellants are not entitled to any remedy against the City." *Id.*

The Sixth Circuit has also stated that, "We assume, without deciding, that the prohibition on respondeat superior liability for

municipal officers also applies where the plaintiffs are seeking injunctive relief rather than damages." *Leary v. Daeschner*, 228 F.3d 729, 740 n.4 (6th Cir. 2000).

Likewise, the Eleventh Circuit has implicitly sided with the Seventh, Fourth and Sixth Circuits in deciding in two separate cases that plaintiffs seeking only injunctive relief were not entitled to such relief against a local governmental entity because they had not shown an official policy or custom. *See Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994); *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989 (11th Cir. 1990).

This Court has not decided the issue whether a local governmental entity or official sued in his or her official capacity for prospective injunctive relief only may be held liable for deprivation of rights without showing an official policy or custom under *Monell*. Indeed, *Monell* itself merely stated that when there was an official custom or policy, damages, declaratory or injunctive relief could be had. *Monell* did not state whether a plaintiff would be able to obtain prospective injunctive relief absent an official policy or custom. *Monell's* progeny likewise has not addressed this issue as each of the cases involved a suit for damages. *See Oklahoma City v. Tuttle*, 471 U.S. 808 (1985) (suit for damages); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (suit for damages); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (suit for damages); *City of Canton v. Harris*, 489 U.S. 378 (1989) (suit for damages); *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) (suit for damages); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989) (suit for damages); *McMillan v. Monroe Cty.*, 520 U.S. 781 (1997) (suit for damages).

Indeed, this Court has never been confronted directly with the issue whether a plaintiff who seeks injunctive relief against a local governmental entity or official in his or her official capacity may

be entitled to such relief under 42 U.S.C, §1983 without showing that the deprivation occurred pursuant to an official policy or custom. This Court has, however, stated in the past that "Of course a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because 'official capacity actions for prospective relief are not treated as actions against the State.'" *Will*, 491 U.S. at 71 (*quoting Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)). There is no principled reason to confine this distinction solely to state officers as opposed to local governmental officers. The Circuit Courts of Appeal are split on this issue, thereby requiring intervention by this Court to clarify this issue and to bring uniformity to the lower federal courts.

II.

MONELL SHOULD BE READDRESSED TO HOLD GOVERNMENTAL ENTITIES LIABLE FOR THE DECISIONS THEY AUTHORIZE THEIR EMPLOYEES TO MAKE

The Seventh Circuit's holding in *Gernetzke* offers a prime example and reason for this Court to readdress its holding in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The Seventh Circuit's opinion allows for a school district to confer authority to its employee to apply a written policy to a specific set of facts, or to act in the absence of a written district policy, and then to stand back and remain insulated from liability when the employee violates a plaintiff's civil rights. Indeed, in this case, the effect of the School District's action comes into sharp focus when viewed through the lens of practicality.

Sharon Gernetzke requested to distribute religious literature on campus. She was denied because the literature was religious, because it was an individual request and was told she could pass

out literature only off campus across the street. The decision to deny her request was made by the Principal, and the Superintendent agreed with the Principal's decision to deny the request. Additionally, the Principal made the decision because he was empowered to render decisions regarding requests by students to distribute literature. The Superintendent was fully aware of the decision-making authority granted to the Principal. School Board policy, and the longstanding practice of the school, allowed the Principal to manage the day-to-day decisions at his school, including distribution of literature by students to students. Yet, under the Seventh Circuit's decision, the School Board is insulated from any liability because there was no specific Policy addressing this specific issue.

School Board Policy 5126.8, entitled "Informational Materials For Students" provides:

> Policy
> Distribution of materials intended as generally informational, as announcements of events of related interest to district staff or students, or announcements of other student recreational opportunities are allowed.
>
> Rule
> 1. ***All such requests, including the copy to be distributed, will be screened and approved by the Superintendent/designees***.
> 2. The District guidelines for distribution of these materials to students will be followed.
> 3. Exceptions to the prescribed guidelines will be cleared through the Superintendent/designee. (emphasis added).

In Superintendent Johnson's deposition, he admitted that this policy applied to situations where students sought to distribute literature from the outside.

Q. Now, you said, I believe, that [District Policy 5126.8] applies to someone from the outside, but it also could be a student bringing literature from the outside.
A. It could represent the same league, I guess. So ***if it's outside information, something that the school district does not sponsor directly, it would apply.***
Q. ***So it could apply to a student wanting to distribute literature after bringing in literature from outside campus?***
A. Or associated with a school activity.
Q. Yes?
A. ***Yes.***

(emphasis added). District Policy 5126.8 on its face specifically applies to a request to distribute materials that are generally informational. Superintendent Johnson testified that Policy 5126.8 applies to situations where a student desired to distribute literature that the student brought from the "outside", i.e., "something that the school district does not sponsor directly . . ." Policy 5126.8 grants the Superintendent and his or her designee the authority to approve literature requests. In his deposition, Superintendent Johnson admitted that Principal Pulaski was his designee at Tremper High School. The Superintendent and his or her designee (Principal Pulaski in this case) have been given final policymaking authority regarding the distribution of literature.

Additionally, Superintendent Johnson testified during his deposition:

Q. Does the principal have the authority to approve or distribute [disapprove] literature on that principal's campus?
A. Yes.
Q. In that particular situation, would the principal be your designee for such literature on that particular campus?

A. Yes.
Q. As designee for you on a particular school campus, if there was not a School Board policy addressing the issue one way or another, would you agree that the principal has the discretion to make a professional judgment?
A. Yes.

In his deposition, Principal Pulaski agreed that he had this delegated authority to review literature requests.

Q. You were here for Dr. Johnson's part of the deposition where the decision to distribute literature on a particular high school would rest with the principal.
A. Yes.
Q. Do you agree with that?
A. Yes.

Not only is there a clear understanding that the Principal is the designated decision maker to review literature requests, but the Superintendent was also in agreement regarding the reasons Principal Pulaski denied the request. When asked "do you agree with the first reason for the denial of literature, because the literature was religious?", Superintendent Johnson stated, "I support his decision." Principal Pulaski, when asked whether he had conversations with Superintendent Johnson regarding the Plaintiffs' literature request, testified as follows:

A. Yes. Has there been a conversation with Dr. Johnson subsequent to the lawsuit about the distribution of literature? Yes.
Q. You understand that he agrees with your decision to deny the literature?
A. Yes.
Q. Do you understand that he supports your decision to deny?

A. That's correct.
Q. And with regards to whether you can make a decision on the distribution of literature, would you agree that, as a principal, you would be a designee of Dr. Johnson to make that decision on your campus?
A. That's my understanding.

It is clear in this case that the decision to deny the literature distribution request was made by Principal Pulaski with the full approval of the Superintendent. Clearly, the Principal of each school has the authority to render decisions regarding student literature distribution. Principal Pulaski testified that his custom of handling literature distribution requests had been in effect since he became the Principal eleven years ago, and that he merely carried on the same practice as the previous Principal. Yet, in this case, the School Board is not acting pursuant to an official custom or policy, in the Seventh Circuit's view, because there was no specific written policy addressing the specific instance at issue.

The inequities of the result in this case clearly counsel for a readdressing of *Monell*. The School District in this case has given authority to the Principal, through the Superintendent, to act within his discretion. The grant of authority to use discretion, no matter how small a grant, should lead to liability for the school district when the grantee of the authority makes decisions within the realm of that authority. To require otherwise allows the Principal to make a decision, within his broad discretion to manage the school, yet the School Board is not held liable for any consequences of that decision. At least in this instance where the School Board has granted authority to the Superintendent and the Principal to manage the individual schools, liability should attach to the School Board for actions taken pursuant to that grant.

Finding the School Board liable under these circumstances will not open the flood gates to liability for acts by persons having no

authority to act. For example, the School Board would not be liable in this case if the teacher rendered a decision regarding literature distribution because the Principal is the one granted the authority to manage the particular school. Similarly, while a city may be liable for a police officer's wrongful arrest because the officer has been granted authority to make arrests, the city would not be liable to a dispatcher arresting a person, because under no circumstances does that decision fall under the duty of a dispatcher.

The grant of authority to the Principal to use discretion is akin to a consent by the School Board to a *respondeat superior* liability. The School Board in this case must be aware that if it grants authority to a Principal to act, then the Principal will act within that area. Because of this knowledge and consent to act, it is highly inequitable to insulate the School Board from liability for the decisions the Principal makes. The School Board grants such authority because it does not, indeed cannot, micro manage the day-to-day operations of each school. Granting immunity to the School Board would frustrate the entire purpose of §1983 to vindicate the most cherished rights of individuals. A grant of immunity in this instance would also lead to the most egregious abuses of the *Monell* doctrine.

Monell was never intended to grant immunity to a school district which knows full well its employees will act in its stead. *Monell* instead read the language of §1983 to not impose "liability vicariously on governing bodies *solely on the basis of the existence of an employer-employee relationship with a tortfeasor*." *Monell*, 436 U.S. at 692 (emphasis added). When there is more than just an employer-employee relationship, then more liability should be attached. In this case, there is more. In this case, the School Board explicitly gave its approval for a principal, as designee of the superintendent, to act in the absence of written district policies. Because of this grant of authority,

liability for the School District would rest on more than *solely* the existence of an employer-employee relationship. Instead, liability would rest on the grant of authority given to the principal by the school board. In cases such as this, where there is a clear grant of authority to act in the stead of the employer, the school board must be held liable for decisions made pursuant to that grant of authority.

The present case is *Monell's* nightmare and represents an abuse of the *Monell* doctrine never intended by that Court, nor by any decisions of this Court. Under the Seventh Circuit's holding, a school district may insulate itself from liability by enacting broad policies full of general assertions and then enacting a "catch-all" policy that grants to the superintendent or principals the authority to use discretion in the absence of district policy. The school would be insulated from liability despite the general grant of authority under the Court's holding.

The evidence suggests that this was just what occurred in this case. Principal Pulaski was authorized to make decisions regarding literature distribution requests and made the decision to deny the request with the approval of the Superintendent. The Superintendent testified that he was aware of the long-standing practice of Principal Pulaski regarding literature distribution requests and approved of that practice. Despite this evidence, the Seventh Circuit found no District policy. Such a construction of *Monell* strains commonsense and results in the nullification of §1983. Federal constitutional and statutory rights are too important to be left to the unfettered discretion of school district officials who operate pursuant to a scheme enacted to insulate the school district from liability. As this Court stated long ago, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 1 Cranch 137, 163

(1803).

Members of this Court have argued before that *Monell's* holding should be readdressed. Justice Stevens has argued forcefully that *Monell* was wrongly decided and should be reexamined. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 834 (1985) (Stevens, J., dissenting). In *Tuttle*, Justice Stevens presented evidence that:

> At the time the statute [§1983] was enacted the doctrine of *respondeat superior* was well recognized in the common law of the several States and in England. An employer could be held liable for the wrongful acts of his agents, even when acting contrary to specific instructions, and the rule had been specifically applied to municipal corporations, and to the wrongful acts of police officers.

Id. at 835. Additionally, Justice Stevens has acknowledged that:

> All of the policy considerations that support the application of the doctrine of *respondeat superior* in normal tort litigation against municipal corporations apply with special force [in the §1983 case] because of the special quality of the interests at stake. The interest in providing fair compensation for the victim, the interest in deterring future violations by formulating sound municipal policy, and the interest in fair treatment for individual officers who are performing difficult and dangerous work, all militate in favor of placing primary responsibility on the municipal corporation.

Id. at 843-44. Justice Stevens then stated that the Court's decision in *Monell*

> can only be explained by a concern about the danger of

> bankrupting municipal corporations. That concern is surely legitimate, but it is one that should be addressed by Congress - perhaps by imposing maximum limitations on the size of any potential recovery or by requiring the purchase of additional liability insurance - rather than by this Court. Moreover, it is a concern that is relevant to the law of damages rather than to the rules defining the substantive liability of "every person" covered by §1983.

Id. at 844. Finally, Justice Stevens concluded that allowing for *respondeat superior* liability would eliminate the confusion surrounding the application of *Monell's* Policy requirement and would "serve the administration of justice and effectuate the intent of Congress." *Id.*

Justice Stevens likewise argued for a readdressing of *Monell* by this Court in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (Stevens, J., concurring in part and concurring in the judgment), stating, "both the broad remedial purpose of the statute [§1983] and the fact that it embodied contemporaneous common-law doctrine, including *respondeat superior*, require a conclusion that Congress intended that a governmental entity be liable for the constitutional deprivations committed by its agents in the course of their duties." *Id.* at 489.

Additionally, Justice Souter, joined by Justice Stevens and Justice Breyer recently argued for this Court to readdress *Monell*. *See Bd. of Cty. Comm'rs. of Bryan Cty. v. Brown*, 520 U.S. 397, 416 (1997) (Souter, J., Stevens, J., Breyer J., dissenting). In dissenting from the Court's holding that a county could not be liable for the single act of hiring a police officer who later used excessive force unless the hiring amounted to a deliberate indifference to a substantial risk that a violation of federal law will result, Justice Souter stated that the Court's result "raises such skeptical hurdles to reaching any such conclusion in practice that

it virtually guarantees its disposition of this case...." *Id.* at 416. Concluding his dissent, Justice Souter remarked:

> The county escapes from liability through the Court's untoward application of an enhanced fault standard to a record of inculpatory evidence showing a contempt for constitutional obligations as blatant as the nepotism that apparently occasioned it. The novelty of this escape shows something unsuspected (by me, at least) until today. Despite arguments that *Monell's* policy requirement was an erroneous reading of §1983, I had not previously thought that there was sufficient reason to unsettle the precedent of *Monell*. Now it turns out, however, that *Monell* is hardly settled. That being so, Justice Breyer's powerful call to reexamine §1983 municipal liability afresh finds support in the Court's own readiness to rethink the matter.

Id. at 429-30 (citations omitted).

Additionally, in *Brown*, Justice Breyer, joined by Justices Stevens and Ginsburg argued for a reexamination of *Monell*. *See also Brown*, 520 U.S. at 430 (Breyer, J., Stevens, J., Ginsburg, J. dissenting). The argument to reexamine *Monell* was based in large part upon *Monell's* official policy or custom requirement and the fact that this "statement has produced a highly complex body of interpretive law." *Id.* at 430. "The soundness of the original principle is doubtful. The original principle has generated a body of interpretive law that is so complex that the law has become too difficult to apply." *Id.* at 431. Instead of merely applying *Monell* to the facts at hand, Justice Breyer instead stated that the confusion surrounding *Monell's* application "rather than leading us to spin ever finer distinctions between liability that rests upon policy and liability that is vicarious, suggests that we should reexamine the legal soundness of that basic distinction itself." *Id.*

at 430-31. Justice Breyer then went on to state, "Without supporting history, it is difficult to find §1983's words '[e]very person' inconsistent with *respondeat superior* liability." *Id.* at 432. Additionally, "*Monell's* basic effort to distinguish between vicarious liability and liability derived from 'policy or custom' has produced a body of law that is neither readily understandable nor easy to apply.... [A] basic legal principle that requires so many such distinctions to maintain its legal life may not deserve such longevity." *Id.* at 433, 435.

Several commentators and legal scholars have also argued that *Monell* was decided on an errant historical analysis and that the holding of *Monell* should be readdressed to provide for *respondeat superior* liability for local governmental entities. *See, e.g.*, Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L. Q. 409 (1978); Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935 (1979); Note, *Monell v. Department of Social Services: One Step Forward and a Half Step Back for Municipal Liability Under Section 1983*, 7 HOFSTRA L. REV. 893 (1979); Comment, *Municipal Liability Under Section 1983 for Civil Rights Violations After Monell*, 64 IOWA L. REV. 1032 (1979); Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986); Kramer & Sykes, *Municipal Liability Under §1983: A Legal and Economic Analysis*, 1987 S. CT. REV. 249 (1987); Mead, *42 U.S.C. §1983 Municipal Liability: The Monell Sketch Becomes A Distorted Picture*, 65 N.C.L.REV. 517 (1987).

The arguments to readdress *Monell* have been based on the unworkability of the official policy or custom standard and the errant *Monell* historical understanding behind 42 U.S.C. §1983 and its applicability to local governmental entities. The context of the present case and the unfettered discretion given to the school district to allow its employees to run amok without imposing

liability on the district is a prime example of why *Monell* ought to be readdressed. It is also a prime example why the holding of *Monell* should be reexamined in light of the history of §1983 and the practical unworkability of the *Monell* official policy or custom standard.

This Court should take this opportunity to address this very important issue dealing with vindication of federal constitutional and statutory rights.

III.

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THE SECOND CIRCUIT ON THE IMPORTANT ISSUE WHETHER THE EQUAL ACCESS ACT SHOULD BE NARROWLY INTERPRETED TO INCLUDE A PERCEIVED "HECKLER'S VETO"

The Seventh Circuit Court of Appeals decision took the novel and unprecedented approach of incorporating a "heckler's veto" into the Equal Access Act. *See Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 467 (7th Cir. 2001); (App., 3a-4a). The Seventh Circuit stated, "The principal's decision to forbid the display of the cross was in any event insulated from liability under the Act by the provision that 'nothing in [the Act] shall be construed to limit the authority of the school ... to maintain order and discipline on school premises.'" *Id.*, (App., 3a). The Seventh Circuit then concluded:

> It is true that to suppress expression on the basis of the angry reaction that it may generate is precisely what the 'heckler's veto' cases, most famously, *Terminiello v. City of Chicago*, 337 U.S. 1, 3-5, 69 S.Ct. 894 93 L.Ed. 1131 (1949), forbid in the name of the free-speech clause of the

> First Amendment. But the 'order and discipline' defense that we just quoted suggests that the principle of those cases has not been carried over into the Equal Access Act."

Id., (App., 3a).

This decision conflicts with the Second Circuit Court of Appeals decision in *Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839 (2d Cir. 1996). In *Hsu*, the Second Circuit specifically stated that, "The protection provided by the *Tinker* line of cases is incorporated into subsection[] ... 4071(f) [of the Act]." *Hsu*, 85 F.3d at 867 n.28. The *Hsu* court specifically recognized that, "Congressional supporters of the Equal Access Act made it clear during the floor debates that the Act adopted [the *Tinker*] limitations [on student free speech rights]." *Id.* at 867. In describing the incorporation of the *Tinker* standard into the Equal Access Act in §4071(f) of the Act, the Second Circuit noted that only speech that "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school or impinges upon the rights of other students" could be restricted by the school under *Tinker*. *Id.* at 870 (internal marks omitted). The Second Circuit then noted that, "Nevertheless, the Equal Access Act strikes the same balance that the Supreme Court has struck between the First Amendment free speech rights and a public school's right to maintain order." *Id.* (*citing* 20 U.S.C. §4071(f)).

Under the Second Circuit's analysis, student religious clubs may be restricted under §4071(f) of the Act only when they materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. A close reading of *Tinker* shows that the *Tinker* Court cited with approval this Court's decision in *Terminiello v. Chicago*, 337 U.S. 1 (1949), which rejected a "heckler's veto" in the First Amendment

context. Likewise, *Tinker* also rejected a "heckler's veto" in the student free speech context.

In contrast to the Second Circuit's opinion, the Seventh Circuit directly confronted the *Terminiello* case and decided that case was not incorporated into the Equal Access Act. This is despite the fact that the Second Circuit clearly held that the Equal Access Act decided that, through *Tinker*, the *Terminiello* repudiation of a "heckler's veto" was incorporated into the Act. This split among the Circuits should be resolved.

By incorporating a "heckler's veto" into the Equal Access Act, the Seventh Circuit gave school administrators breathtaking and unprecedented power the Equal Access Act never intended to give them and ensured that the Equal Access Act would have no meaningful application in the future. Under the Seventh Circuit's "heckler's veto" incorporation, a principal just needs to demonstrate some fear of "incit[ing] ugly conflicts among the students," (App., 3a), and the principal is then free to deny equal treatment to a religious student club.

The Seventh Circuit insulated the Principal's decision from liability under this "heckler's veto" incorporation. The Circuit Court found that the Principal's justification for the rejection of the cross on the mural was because:

> He was afraid that the inclusion of so salient a Christian symbol would invite a lawsuit against the school based on the establishment clause of the First Amendment and might also require him to approve murals of a Satanic or neo-Nazi character, which would cause an uproar. The school body includes adherents of both these unlovely creeds - and in fact the Bible Club's mural was defaced with a witchcraft symbol, and a group of skinheads unsuccessfully petitioned the principal to allow them to

paint a mural containing a swastika.

Id. at 466, (App., 2a).[1] The Seventh Circuit believed that this was sufficient justification for the principal to deny the inclusion of the cross on the mural based upon the reaction it may cause among other groups.[2] Such a formulation does extreme damage to the Equal Access Act, grants unfettered discretion to school administrators to deny equal treatment to student religious clubs and narrowly interprets the Equal Access Act out of existence.

There is no justification for incorporating a "heckler's veto" into the Equal Access Act. This is especially so since the Seventh Circuit merely incorporated it without giving any guidelines on what rises to the level of sufficiency for the school principal to deny equal access to a student religious club. However, the language quoted by the Seventh Circuit and construed by that court to incorporate a "heckler's veto" into the Equal Access Act merely tracks the language of this Court in *Tinker v. Des Moines Independent School District*, 393 U.S. 506 (1969). Indeed, in *Tinker*, this Court gave student expression wide latitude unless it "materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." *Id* at 512 (citations and editorial marks omitted). A school is allowed to silence a student's freedom of expression only when that freedom of expression results in the material and substantial disruption of

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[1] The Principal was never approached by any "skinheads". Instead, the Activities Director, Mr. Damon Weiss, was the individual approached by the so-called "skinheads". This incident took place *after* the lawsuit was filed and so could not have formed the basis for the Principal's denial of the cross on the mural, as that decision was made prior to the lawsuit.

[2] This is true even though only approved student clubs were authorized to paint the murals on the wall. The so-called "skinheads", "Satanists", or "neo-Nazi's" are not student clubs at Tremper High School and therefore would not be entitled to paint a mural on the wall.

the educational environment this Court spoke of in *Tinker*. However, this Court also went on in *Tinker* to describe when discipline has been materially and substantially interfered with to justify a restriction on student expression. This Court stated:

> But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom--this kind of openness--that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Id. at 508. Therefore, this Court made clear that merely because some speech would be uncomfortable or unpopular does not justify a school's restriction or silencing of that speech. The school must demonstrate more than undifferentiated fear or apprehension of disturbance to the discipline and order of the

school.

Therefore, the language in the Equal Access Act which the Seventh Circuit used to incorporate a "heckler's veto" is nothing less or more than an incorporation of the *Tinker* standard. Far from incorporating a "heckler's veto" into the Act, the language in §4071(f), (App., 38a), counsels against a "heckler's veto" and incorporates the *Tinker* standard into the Equal Access Act.

In this case, there is nothing more than an undifferentiated fear or apprehension of disturbance. The only concrete examples the school may point to are the painting of graffiti on the Bible Club mural immediately *after* the suit was filed and the activities director being approached one time by a person he claimed was a "skinhead" asking for permission to paint a mural.[3] As the painting of graffiti on the mural occurred *after* the lawsuit was filed, it therefore cannot be a justification for the principal's initial denial of the cross. Schools do not prohibit their students from using the bathroom merely because some undisciplined student may scrawl a derogatory message about them on the bathroom wall. Likewise, schools should not prohibit the Bible Club from painting a cross on its mural based on one single, isolated incident of graffiti that occurred well after the initial decision to refuse the cross on the mural. This "evidence" is extremely far away from this Court's formulation of the *Tinker* standard to justify restriction on freedom of expression.[4] As this standard was

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[3] As stated earlier, there has never been a so-called "skinheads" or "neo-Nazi" student club, and thus this imaginary hypothetical is only the product of an overactive mind created by ad hoc retrospection.

[4] "Any yardstick less exacting than [that] could result in school officials curtailing speech at the slightest fear of disturbance, a prospect that would be completely at odds with this Court's pronouncement that the 'undifferentiated fear or apprehension of disturbance is not enough [even in the public school context] to overcome the right to freedom of expression.'"

likewise incorporated into the Equal Access Act, this "evidence" cannot justify the denial to paint a cross on the mural under the Act.

The Seventh Circuit's extremely myopic construction of the Equal Access Act does significant damage to that Act and clearly violates Congressional intent. The Seventh Circuit took the Equal Access Act to places it was never intended to go, and in so doing substantially limited its application in the way Congress intended.

This Court should exercise jurisdiction to decide this issue of great importance.

IV.

THE SEVENTH CIRCUIT AFFIRMED THE DISTRICT COURT'S EXTREMELY NARROW DEFINITION OF THE TERM "MEETING" IN THE EQUAL ACCESS ACT THAT DIRECTLY CONFLICTS WITH THIS COURT'S CONSTRUCTION OF THE ACT

The Seventh Circuit affirmed the District Court's opinion that restrictively defined the term "meeting" in the Equal Access Act to only apply to meetings in a spatial sense. *See* (App., 32a-34a). In doing so, the Seventh Circuit clearly contradicted this Court's construction of the Equal Access Act in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990).

In *Mergens*, this Court held that a school's denial of official recognition to a religious group constituted a violation of the Equal Access Act. *Id.* at 247. The Court stated:

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 289 (1988) (Brennan, J., dissenting) (citations omitted).

> [R]espondents seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the Student Activities Program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual club fair. ... We hold that Westside's denial of respondents' request to form a Christian club denied them "equal access" under the Act.

Id. at 247. *Mergens* made clear that equal access applied to more than just the strict term of meetings but also applied to access which has been granted to any other student group within the school. In this respect, this Court held that because other student groups had access to the school newspaper, bulletin board, the public address system and the annual club fair, then the religious club had to be given equal access to those facilities as well.

The definitional section of the Act also makes clear that the term "meetings" applies in more than a spatial sense. The term "meeting" is defined as "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." 20 U.S.C. §4072 (3), (App., 38a). Therefore, the term meeting clearly denotes those *activities* of a student group and not just its meetings at specific places and times.

The District Court and the Seventh Circuit's construction of the Equal Access Act in this case narrowly defined the term "meeting" to not apply to the broader activities of the Bible club. The District Court stated, "However, the court is not persuaded that allowing members of a student club to paint a Christian cross in a school thoroughfare that students must traverse daily is voluntary "meeting" contemplated by the Act. Furthermore, it would strain commonsense for this court to conclude that merely

applying paint to a flat wall constitutes a meeting covered by the Equal Access Act." (App., 34a). This narrow interpretation denies the equal rights and privileges to a religious student club enjoyed by other similar student clubs. As such, it directly contradicts this Court's decision in *Mergens* and too narrowly interprets the Equal Access Act.

This Court should exercise jurisdiction to decide this important issue and to consistently interpret the Equal Access Act.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 01-2084

SHARON GERNETZKE, INDIVIDUALLY, AND DOREEN BEZOTTE, PARENT AND LEGAL GUARDIAN OF JOSEPH BEZOTTE, PLAINTIFFS-APPELLANTS,

v.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, MICHAEL JOHNSON IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, AND CHESTER PULASKI IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF GEORGE N. TREMPER SENIOR HIGH SCHOOL, DEFENDANTS-APPELLEES.

Argued Oct. 29, 2001
Decided Dec. 14, 2001

OPINION

POSNER, CIRCUIT JUDGE

Two high-school students sued a Wisconsin public school district and two of its administrators, the superintendent of the district and the principal of the plaintiffs' school (which is located in the City of Kenosha), charging violations of their constitutional and statutory rights to religious freedom. They sought both

damages and injunctive relief. The individual defendants were sued only in their official capacities, so naming them as defendants added nothing to the suit. The plaintiffs appeal from the grant of summary judgment to the defendants.

The plaintiffs belonged to the Bible Club at their school. In response to the school's invitation to all student groups to paint murals in the main hallway of the school, the Club submitted a sketch for a mural 4 feet by 5 feet depicting a heart, two doves, an open Bible with a well-known passage from the New Testament (John 3:16: "For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life"), and a large cross. The principal approved all but the cross. He was afraid that the inclusion of so salient a Christian symbol would invite a lawsuit against the school based on the establishment clause of the First Amendment and might also require him to approve murals of a Satanic or neo-Nazi character, which would cause an uproar. The school body includes adherents of both these unlovely creeds--and in fact the Bible Club's mural was defaced with a witchcraft symbol, and a group of skinheads unsuccessfully petitioned the principal to allow them to paint a mural containing a swastika. (According to a newspaper article in the record, the school has "active [white] supremacists enrolled there" and there have been racial incidents.) The principal had also forbidden mention of a specific brand of beer in the mural proposed by the Students Against Drunk Driving.

The plaintiffs complain not only about the excision of the cross from their mural but also about the principal's refusal to allow one of them to distribute unspecified religious literature schoolwide. In support of the first charge they cite the Equal Access Act, 20 U.S.C. sec. 4071(a). The Act forbids a school to deny equal access to its premises to a student group merely on the basis of the content (e.g., religious) of the speech at meetings of the group. The school could therefore not discriminate against the Bible Club

merely because it is a religious rather than a secular association. Had the school, therefore, while permitting the Bible Club to meet on school premises, forbidden it to announce its meetings or otherwise compete on equal terms with comparable but nonreligious student groups, it would have violated the Act. *Board of Education v. Mergens*, 496 U.S. 226, 247 (1990); *Pope by Pope v. East Brunswick Board of Education*, 12 F.3d 1244, 1256 (3d Cir. 1993). But there is no evidence of discrimination against the Bible Club. The principal forbade the inclusion of a large cross in the Club's mural because he was afraid that it might invite a lawsuit (*cf. Linnemeir v. Board of Trustees*, 260 F.3d 757, 759 (7th Cir. 2001)) and incite ugly conflicts among the students. His reaction to the swastika, and to the naming of a brand of beer, in proposed secular murals shows that he was discriminating not against religion but merely against displays, religious or secular, that he reasonably believed likely to lead to litigation or disorder. (The naming of a specific brand of beer in the mural of a student abstinence group might have encouraged students to show their defiance by getting drunk on it.)

The principal's decision to forbid the display of the cross was in any event insulated from liability under the Act by the provision that "nothing in [the Act] shall be construed to limit the authority of the school . . . to maintain order and discipline on school premises." 20 U.S.C. sec. 4071(f). It is true that to suppress expression on the basis of the angry reaction that it may generate is precisely what the "heckler's veto" cases, most famously *Terminiello v. City of Chicago*, 337 U.S. 1, 3-5 (1949), forbid in the name of the free-speech clause of the First Amendment. But the "order and discipline" defense that we just quoted suggests that the principle of those cases has not been carried over into the Equal Access Act. And anyway the First Amendment has been sensibly interpreted to allow school authorities greater control over the free speech of students than the state is permitted to exercise over the free speech of adults engaged in political

expression in the normal venues. "A school need not tolerate student speech that is inconsistent with its 'basic educational mission' . . . even though the government could not censor similar speech outside the school." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *see also Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1536-37 (7th Cir. 1996); *Baxter by Baxter v. Vigo County School Corp.*, 26 F.3d 728, 737-38 (7th Cir. 1994). Order and discipline are part of any high school's basic educational mission; without them, there is no education.

The plaintiffs claim that the excision of the cross and the refusal to permit distribution of religious literature also interfered with the free exercise of their religion, in violation of the religion clauses of the First Amendment as interpreted in such cases as *Good News Club v. Milford Central School*, 121 S. Ct. 2093, 2100-02 (2001). We shall not have to reach the merits of that claim, which anyway seem dim, at least so far as the excision of the cross is concerned (the refusal to permit the plaintiffs to distribute religious literature was challenged only under the First Amendment, and not under the Equal Access Act as well); we shall not conceal our doubts that the First Amendment has a broader scope than the Equal Access Act, *Hsu By and Through Hsu v. Roslyn Union Free School District No. 3*, 85 F.3d 839, 870 and n. 30 (2d Cir. 1996), although the Supreme Court has reserved the issue. *Board of Education v. Mergens*, *supra*, 496 U.S. at 247; *see also Ceniceros By and Through Risser v. Board of Trustees*, 106 F.3d 878, 881 n. 3 (9th Cir. 1997).

The procedural vehicle for the constitutional claim is 42 U.S.C. sec. 1983, and an initial puzzle is why the plaintiffs did not sue the individual defendants in their individual capacities, where they would not face the Monell issue that we discuss below and show is fatal to the claim regardless of the claim's merits. We did not obtain a satisfactory response when we asked this question of

the plaintiffs' lawyer at oral argument.

We pause here to express our doubts about the appropriateness of litigation that is intended, whether by the friends of religion or by its enemies, to wrest the day-to-day control of our troubled public schools from school administrators and hand it over to judges and jurors who lack both knowledge of and responsibility for the operation of the public schools. The plaintiffs' high school is an urban school with 2000 students and 42 student groups. The regulatory and disciplinary problems implied by these numbers are formidable. In her diary, which is part of the record, plaintiff Gernetzke wrote: "[T]here's something exciting[:] I'm suing Kenosha Unified School District #1 . . . . The law suit is getting very interesting. KUSD is getting themselves deeper in cow dung than what they realize!" Do we really need this?

Monell v. Department of Social Services, 436 U.S. 658, 690, 694 (1978), holds that the doctrine of respondeat superior may not be used to fasten liability on a local government in a suit under section 1983. *See also Cornfield by Lewis v. Consolidated High School District No. 230*, 991 F.2d 1316, 1324 (7th Cir. 1993). The predominant though not unanimous view is that Monell's holding applies regardless of the nature of the relief sought. Compare, e.g., *Greensboro Professional Fire Fighters Ass'n, Local 3157 v. City of Greensboro*, 64 F.3d 962, 967 n. 6 (4th Cir. 1995), and *Church v. City of Huntsville*, 30 F.3d 1332, 1347 (11th Cir. 1994), with *Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989); *see also Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 363 (S.D.N.Y. 2000). We need not take sides in this case, since the plaintiffs do not argue that Monell is applicable only to their damages claim.

Respondeat superior is of course the judge-made doctrine, applicable to most tort cases but not to section 1983 cases, that

makes an employer liable even if faultless for the torts its employees commit in the course of their employment. So the plaintiffs in this case cannot prevail against the school district by showing merely that the superintendent of the district and the principal of their school, acting within the scope of these officials' employment and therefore under color of state law, deprived the plaintiffs of religious liberty. They must show that the district itself, which is to say the officials or official boards that constitute the relevant final decisionmaking authority (legislative or executive) within the district, was directly responsible for the deprivation. *McMillian v. Monroe County*, 520 U.S. 781, 784-85 (1997); *Horwitz v. Board of Education*, 260 F.3d 602, 619 (7th Cir. 2001); *Baskin v. City of Des Plaines*, 138 F.3d 701, 705 (7th Cir. 1998).

This standard for municipal liability is often referred to as liability for "policy or custom," after language in *Monell v. Department of Social Services*, supra, 436 U.S. at 694. And also tracking language in *Monell* courts often refer to the municipality's final decisionmaking authority as its "final policymaking authority." *E.g., Baskin v. City of Des Plaines, supra*, 138 F.3d at 705. These usages are potentially misleading. It doesn't matter what form the action of the responsible authority that injures the plaintiff takes. It might be an ordinance, a regulation, an executive policy, or an executive act (such as firing the plaintiff). The question is whether the promulgator, or the actor, as the case may be--in other words, the decisionmaker--was at the apex of authority for the action in question. *See, e.g., Eversole v. Steele*, 59 F.3d 710, 716 (7th Cir. 1995). An executive official who rather than making policy merely implements legislative policy acts merely as a delegate of the legislature, and his act is therefore not the act of the municipality itself for purposes of liability under section 1983. *Auriemma v. Rice*, 957 F.2d 397 (7th Cir. 1992).

The bearing of delegation on the principle of *Monell* turns out to be critical in this case. The final decisionmaking authority of the school district is lodged in the district's school board, but the board has promulgated regulations that delegate the administration of the five high schools in the school district to the principal of each school. This delegation, the plaintiffs argue, makes the principal the final decisionmaker so far as the mural and the request to be allowed to distribute literature are concerned. That cannot be right. It would collapse direct and derivative liability. Every public employee, including the policeman on the beat and the teacher in the public school, exercises authority ultimately delegated to him or her by their public employer's supreme governing organs. A police officer has authority to arrest, and that authority is "final" in the practical sense that he doesn't have to consult anyone before making an arrest; likewise a teacher does not have to consult anyone before flunking a student. That is a perfectly good use of the word "final" in ordinary conversation but it does not fit the cases; for if a police department or a school district were liable for employees' actions that it authorized but did not direct, we would be back in the world of respondeat superior. To avoid this the cases limit municipal liability under section 1983 to situations in which the official who commits the alleged violation of the plaintiff's rights has authority that is final in the special sense that there is no higher authority. *Partee v. Metropolitan School District*, 954 F.2d 454, 456 (7th Cir. 1992); *Beattie v. Madison County School District*, 254 F.3d 595, 603 (5th Cir. 2001). School superintendents, principals, and teachers in Wisconsin do not have final authority in this sense, Wis. Stat. sec. 120.13(b)(1); cf. *Horwitz v. Board of Education*, supra, 260 F.3d at 619; *Duda v. Board of Education*, 133 F.3d 1054, 1061 (7th Cir. 1998); *Cornfield by Lewis v. Consolidated High School District No. 230*, supra, 991 F.2d at 1325-26, as they would if the Wisconsin legislature had vested the authority to make all decisions concerning school administration in them rather than in the school boards. Delegation is not direction; authorization is not

command; permission does not constitute the permittee the final policymaking authority. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1988) (plurality opinion); *Brown v. Neumann*, 188 F.3d 1289, 1290 (11th Cir. 1999) (per curiam). Only the delegation ("conferral" would be a better term) of final authority makes the "delegate" the final authority. *City of St. Louis v. Praprotnik*, *supra*, 485 U.S. at 126-27; *Cornfield by Lewis v. Consolidated High School District No. 230*, *supra*, 991 F.2d at 1325; *Ware v. Unified School District No. 492*, 902 F.2d 815, 818-19 (10th Cir. 1990).

It is true that by adopting an employee's action as its own (what is called "ratification"), a public employer becomes the author of the action for purposes of liability under section 1983. *Kujawski v. Board of Commissioners*, 183 F.3d 734, 737 (7th Cir. 1999); *Baskin v. City of Des Plaines*, *supra*, 138 F.3d at 705; *Hyland v. Wonder*, 117 F.3d 405, 416 (9th Cir. 1997). This is not a legal fiction, at least in the bad sense of that term, but merely recognition that direction and approval do not differ practically. The plaintiffs argue that ratification occurred here when after they brought this suit the school board refused to direct the principal of their school to alter his response to their demand. The argument if accepted would convert every public employee's action that a plaintiff wished to challenge into the action of the employer. *City of Canton v. Harris*, 489 U.S. 378, 391-92 (1989); *Cygnar v. City of Chicago*, 865 F.2d 827, 847 (7th Cir. 1989); *Soderbeck v. Burnett County*, 752 F.2d 285, 293 (7th Cir. 1985); *Crowley v. Prince George's County*, 890 F.2d 683, 687 (4th Cir. 1989); *see also Smith v. Chicago School Reform Board of Trustees*, 165 F.3d 1142, 1149 (7th Cir. 1999); *Jones v. City of Chicago*, 787 F.2d 200, 204-05 (7th Cir. 1986). From the plaintiff's standpoint it would be a case of "heads I win, tails you lose." The plaintiff would ask the employer for relief and if the employer granted it would not have to sue, while the employer who refused to grant the relief requested would be punished by being deemed to

consent to the application of the doctrine of respondeat superior. Deliberate inaction might be convincing evidence of delegation of final decisionmaking authority, or of ratification, *cf. Jones v. City of Chicago*, *supra*, 787 F.2d at 204-05, but there is no evidence of that here.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

No. 00-C-201

SHARON GERNETZKE, INDIVIDUALLY
AND JOSEPH BEZOTTE, BY AND THROUGH
DOREEN BEZOTTE, HIS PARENT AND
LEGAL GUARDIAN,
PLAINTIFFS,

v.

KENOSHA UNIFIED SCHOOL
DISTRICT NO. 1
DR. MICHAEL JOHNSON,
DR. CHESTER PULASKI,

DEFENDANTS.

DECISION AND ORDER GRANTING PLAINTIFFS' MOTION FOR JUDICIAL NOTICE OF FEDERAL FUNDING, GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, DENYING AS MOOT PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DISMISSING CASE WITH PREJUDICE

Plaintiffs Sharon Gernetzke and Joseph Bezotte, students at Tremper High School, filed this action after their principal, Dr. Chester Pulaski, denied a request by the school's Bible Club to

paint a cross on a hallway mural.[5] Moreover, the complaint charges that Pulaski denied Gernetzke's request to distribute religious literature at Tremper. Plaintiffs sued Pulaski and Dr. Michael Johnson, Superintendent of the Kenosha Unified School District No. 1, in their official capacities alleging violations of the Establishment Clause, rights to free speech, protection under the Equal Access Act and the First and Fourteenth Amendments. The same claims are asserted against the Kenosha Unified School District.[6] Cross-motions for summary judgment call on the court to decide whether the school district is liable for the actions of its principal.

Summary Judgment Standard

Summary judgment is proper only when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue for trial exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must view all evidence in a light most favorable to the nonmoving party and draw all reasonable and justifiable inferences in favor of that party. *Id.* at 255. However, if the evidence is merely colorable, minimally probative, or raises "some metaphysical doubt as to the material facts," summary judgment may be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). When both parties seek summary judgment, the court "look[s] to the burden of proof that

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[5]Plaintiff Gernetzke graduated on June 11, 2000. Plaintiff Joseph Bezotte will graduate in June of 2001, and is appearing through his parent and legal guardian, Doreen Bezotte (Joseph Bezotte Dep. p. 3)

[6]Plaintiffs' complaint includes a free exercise claim, which has been abandoned by the plaintiffs on summary judgment.

each party would bear on an issue at trial; then [the court] require[s] that party to go beyond the pleadings and affirmatively to establish a genuine issue of material fact." *Santaella v. Metro Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997) (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

Findings of Fact[7]

Kenosha Unified School District No. 1 (District) is a public school system operating under Wisconsin laws. (Johnson Aff. ¶ 3) The District has 41 school sites: 5 satellite head start centers, 25 elementary schools, 6 middle schools including one academy, and 5 senior high schools, including two academies. (*Id.*) Dr. Michael Johnson is the Superintendent of Schools for the District and has held the post since June, 1996. (Johnson Aff. ¶ 2)

The District operates George N. Tremper High School, a comprehensive, grades 9-12 senior high school. (Pulaski Aff. ¶ 13) Approximately 2,000 students attended Tremper during the 1999-2000 school year and the principal, Dr. Chester Pulaski, has been employed by the District at Tremper since the fall of 1989. (Pulaski Aff. ¶¶ 2, 3; Pulaski Dep. p. 5)

When the complaint was filed, plaintiff Sharon Gernetzke was a senior student at Tremper. She graduated in June, 2000. (Gernetzke Dep. pp. 1, 3) Plaintiff Joseph Bezotte is a junior at the school. (Jos. Bezotte Dep. p. 3) Plaintiff Doreen Bezotte is Jospeh Bezotte's mother and joined this lawsuit because her son

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[7]Plaintiffs' objections to defendants' proposed findings of fact do not comply with former Local Rule 6.05(b)(1) (now Civil L.R. 56.2(b)(2)0, which requires citations to evidentiary materials supporting the claim that a dispute exists. The court has considered plaintiffs' objections and carefully reviewed the evidence in the record to determine whether a genuine issue of material fact exists.

is a minor. (Doreen Bezotte Dep. pp. 3-5) She does not seek damages and has no personal knowledge regarding the issues. (*Id.*)

There are approximately 42 school-recognized student groups/clubs, identified in Tremper's Student Handbook, which hold meetings on school premises, generally after school hours. (Pulaski Aff. ¶ 4) District policy allows student groups, including non-curriculum related student groups, access to District facilities. (Johnson Aff. ¶ 14)

Plaintiffs Gernetzke and Bezotte joined the Bible Club, also known as Trojans Loving Christ (TLC). The Bible Club is a voluntary, student-initiated, student led group meeting every Wednesday from 3:00 to 4:00 p.m. in the Tremper library. (Pulaski Aff. ¶ 5; Gernetzke Dep. p. 11) The Bible Club functioned at Tremper prior to and since Pulaski became principal of Tremper in the fall of 1989. (*Id.*)

During the Bible Club meetings, club members socialize, discuss scripture and activities to recruit other students. (*Id.* at 13) The Bible Club meetings are announced over the school's public address system with other club announcement. (Gernetzke Dep. p. 17; Bezotte Dep. p. 75) In addition, the Bible Club announces meetings by placing "good size" posters on Tremper bulleting boards. (Gernetzke Dep. p. 23) Jean Schultz, Tremper's librarian, served as the Bible Club advisor. (*Id.* at 24) Bezotte is a past Vice-President and current President of the Bible Club. (Gernetzke Dep. p. 10; Bezotte Dep. p. 5)

Four or five years ago, Pulaski thought he would "liven" the school's institutional environment by inviting student groups to decorate open walls near the school's cafeteria with painted murals. (Pulaski Aff. ¶ 7; Pulaski Dep. p. 20) All student groups interested in painting murals were required to submit proposed

designs to Tremper's Activities Director, Damon Weiss, who, in turn would submit the designs to Pulaski for final approval. (*Id.*) All did not submit mural designs for approval. (Pulaski Aff. ¶ 7)

In January or February or 1999, the Bible Club discussed putting up a mural at Tremper. (Bezotte Dep. pp. 11-13; Gernetzke Dep. pp. 23-25) Bible Club member, Jennie Cain, submitted a mural design to Weiss and Pulaski on behalf of the Bible Club seeking approval. (*Id.* at 14, 15, 20) The design consisted of a heart, two doves, an open Bible with the text fo John 3:16 and a cross. (Pulaski Aff. ¶ 11)

According to Gernetzke, the cross on the Bible Club's proposed sketch was "good-sized," and yellow in color. (Gernetzke Dep. p. 28) It was to extend horizontally from the left side of the heart to the right side of the heart. (*Id.* at 31) Vertically, the cross was to extend from the bottom of the heart to a point vertically above the two bumps at the top of the heart. (*Id.* at 31)

The Bible Club's proposed mural sketch was approved by club advisor, Jean Schultz. Next, it was submitted to Weiss and Pulaski for approval. (Bezotte Dep. pp. 13-14) However, neither Gernetzke nor Bezotte was present when the initial sketch was submitted. (Gernetzke Dep. pp. 27, 46; Bezotte Dep. pp. 15, 17)

Pulaski approved the design, except for the cross. (Pulaski Aff. ¶ 14) He was concerned that painting the cross, an obvious Christian symbol, on Tremper's wall, would: (1) violate the Establishment Clause, promote Christianity, expose the District to litigation and create controversy in the school; (2) cause school disruption; and (3) require equal access on the wall for other controversial expressions, including those of a Satanic or Nazi nature which would further create disruption in the school and possible threaten the safety of the school and the Bible Club

members. (Pulaski Aff. ¶ 12, 14; Bezotte Dep. pp. 24-26, 43-44; Gernetzke Dep. pp. 50-51)

In the fall of 1999, the Bible Club completed the mural approved by Pulaski. (Gernetzke Dep. pp. 35, 42-43, 48, 50; Bezotte Dep. p. 35) The mural, which is 54 inches by 62 inches (Gernetzke Dep. pp. 29, 36, 38, 40), is located in the "east hallway of the school" where "everybody" travels. (*Id.*) Students and visitors must pass the Bible Club mural to get to the lunch rooms, commons, classes, gym, and auditorium. (*Id.*) Indeed, all Tremper students pass the mural at one time or another (and possibly two or three times) during the day. (*Id.*)

The Bible Club, German Club, French Club, International Club, Spanish Club, Students Against Driving Drunk (S.A.D.D.), New Voice Radio, Soccer Tremper, Varsity Club, Home Court and the Girls' Track Team painted murals at Tremper. (Pulaski Aff. ¶ 8) Pulaski disapproved the inclusion of any alcohol references on a can depicted in the mural submitted by S.A.D.D. (E.g. Budweiser beer). (*Id.* at ¶10) (Pulaski Dep. p. 22) Ultimately, S.A.D.D. painted a red can, car keys, and an outstretched hand, but did not refer to BUD, Budweiser or alcohol. (Pulaski Aff. Ex. G; Pulaski Dep. pp. 22-25; Gernetzke Dep. p. 116)

Pulaski views the murals as an expression of student clubs and of the school. (Pulaski Dep. pp. 27-29) He does not believe that the students in grades none to twelve are mature enough to differentiate between school expression and club expression. (Pulaski Dep. p. 29) He further believes a sign identifying the murals as expression by various clubs would not necessarily cause students and visitors to make the connection between the sign, the clubs and the murals. (Pulaski Dep. p. 29)

Gernetzke believes there is "no such thing" as separation of

church and state as the "Constitution does not say anything" to this effect. (Gernetzke Dep. pp. 51, 52) At the same time, she feels that Pulaski's concern for the safety of the Bible Club members was "legitimate." (*Id.* at 55) Both Gernetzke and Bezotte believe that students can distinguish between school sponsorship and what students are saying on their own. (Gernetzke Dep. p. 110, 127-28; Bezotte Dep. pp. 86-88)

Plaintiffs maintain that the cross is a sign of Christianity, identifies them as followers of Jesus Christ, and that the cross proposed for the Bible Club's mural shows that the organization follows Jesus Christ. (*Id.* at 57, 58) No other Tremper mural has religious symbols. (*Id.* at 58)

The Bible Club mural has been vandalized by graffiti on three occasions since completion. (*Id.* at 109, 129) (Bezotte Dep. p. 60) One defacement was a pentagram symbolizing witchcraft. (*Id.* at 61) According to Pulaski, during his tenure at Tremper, the student body has included admitted Satanists and Neonazists. (Pulaski Aff. ¶ 13)

In about April or May of 1999, after the Bible Club began painting its mural at Tremper, Weiss, the Activities Director, was approached by a couple of Tremper students wearing trench coats. (*Id.* at ¶ 3)[8] The incident was subsequent to the student shootings at Columbine High School in Colorado. (*Id.*) The students in trench coats said to Weiss that since the Bible Club had put up the mural they would like to put up one with a

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[8]Plaintiffs' attorney filed a motion to strike the affidavit of Damon Weiss, and objected to the affidavit during the oral argument on the cross-motions for summary judgment. The court is puzzled by the objection because plaintiffs' attorney withdrew his motion to strike before oral argument. In any event, the court finds no merit on the motion to strike as Weiss was identified in the initial disclosure and referred to by plaintiffs' own witnesses.

swastika. (*Id.* at 114) Weiss concluded the students were "skinheads." (*Id.* at 115)

In the fall of 1999, Gernetzke asked Pulaski if she could distribute religious literature. (Pulaski Dep. p. 38; Gernetzke pp. 78, 117-119)[9] The request contemplated a mass distribution, beyond the student's immediate circle of friends. (Pulaski Dep. p. 47; Gernetzke Dep. pp. 80-81) Gernetzke did not show Pulaski a copy of the material and Pulaski had no specific information as to its contents. (Pulaski Aff. ¶ 18; Pulaski Dep. p. 37; Gernetzke Dep. pp. 75, 77, 79) Gernetzke failed to state the "kind of documents" she wanted to hand out other than that they were "religious." (*Id.* at 79) Furthermore, plaintiffs never submitted any written materials or literature to Johnson requesting approval for distribution. (Johnson Aff ¶ 10)

Gernetzke's meeting with Pulaski regarding the distribution of materials was not discussed with the Bible Club; nor did the Bible Club designate Gernetzke to see Pulaski on the issue of distributing religious literature. (Gernetzke Dep. p. 82) Gernetzke stated in her deposition that she made the request for herself. (*Id.* at 82)[10] Bezotte testified that he never met with Pulaski or Johnson regarding religious tracts. (Bezotte Dep. pp.

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[9]Gernetzke testified that she made the initial request in February or March of 2000. However, her attorney asked her clarification questions at the end of the deposition and she responded that the initial request was made in 1999. (Gernetzke Dep. pp. 76-77, 119) The court previously ruled that plaintiffs could not pursue their claims with request to distribute a Bible because the request was made after the filing of the complaint, and plaintiffs sought leave to amend their complaint only after the dispositive motions were fully briefed. (Doc. #87)

[10]Although when asked a clarification question by her attorney at the end of the deposition, she testified that she made the request "individually and as the club." (Gernetzke Dep. p. 118)

65, 74; Johnson Aff. ¶ 10)

Pulaski did not authorize Gernetzke to distribute literature on the school property because it was an "individual" request rather than a student organization-related request and because the literature was religious. (Pulaski Aff. ¶ 9; 2/28/00 Pulaski Aff. ¶ 19)

Pulaski told Gernetzke that she could only distribute literature off campus across the street. (Gernetzke Dep. pp. 117-118; Bezotte Dep. p. 71; Pulaski Dep. p. 39; Pulaski Aff. ¶ 19) It is Pulaski's practice to prohibit individual distribution of literature, publications, pamphlets, etc. on Tremper grounds irrespective of whether it is secular or religious literature. (Pulaski Dep. pp. 42, 46) Pulaski testified in his deposition that individuals cannot distribute literature to students they do not know without discipline in the form of a verbal reprimand. (Pulaski Dep. p. 71) On the other hand, student organization may distribute literature during the lunch hour with prior approval of either Pulaski or Tremper's Activities Director. (Pulaski Aff. ¶ 21) Pulaski added that if an individual such as Gernetzke - not associated with the Bible Club - wanted to distribute religious literature to people she did not know, she would be disciplined in the form of a verbal reprimand. (Pulaski Dep. 71)

The District's Board of Education has adopted the following policy:

Policy 5126.8, entitled "INFORMATIONAL MATERIALS FOR STUDENTS" states:

> Policy
> Distribution of materials intended as generally informational, as announcements of events of related interest to District staff or students, or announcements of

other student recreational opportunities are allowed.

Rule

1. All such requests, including the copy to be distributed, will be screened and approved by the Superintendent/designee.
2. The District guidelines for distribution of these materials to students will be followed.
3. Exceptions to the prescribed guidelines will be cleared through the Superintendent/designee. (Johnson Aff. Ex. B)

Policy 5126.8 governs materials that are "generally information" as "announcements of events" or "announcements of other student recreational opportunities." (Policy 5126.8, Ex. B to Johnson Aff.) It requires that all requests "including the copy to be distributed" be screened and approved by the Superintendent or his designee. (Policy 5126.8, Ex. B to Johnson Aff.) The Policy was intended to regulate the mass distribution of informational materials to District students, such as take-home announcements and mailings, from outside groups or individuals. (Johnson Aff. ¶ 5)

Administrative guidelines (i.e. Document 402) governing distribution of materials in schools under Policy 5126.8 were formulated pursuant to District Policy 8515. (Johnson Aff. ¶ 6, 7) Document 402, entitled "Distribution Guidelines," refers to "materials reflecting planned programs of community or private sponsorship" and distribution through school mail or the posting of materials in schools. (Document 402, Ex. D to Johnson Aff.) The guidelines provide for the packaging of announcements in groups of 30 for easy "teacher distribution." (*Id.*) The general rule to be followed is that information for dissemination "be an extension of the curriculum" of the District. (*Id.*)

In addition, the District has a Policy 2210, entitled "The Building Principal." (Johnson Dep. Ex. 2) Policy 2210 identifies the principal as the chief administrative and instructional officer of the school who is directly responsible to the Executive Director of 9-12 instruction of his/her designee for high schools. (*Id.*) Policy 2440, entitled "Administrative Leeway in Absence of District Policy" allows the Superintendent of Schools/designee to use professional judgment when the School Board has not adopted policies or other guidelines for administrative action. (Johnson Dep. Ex. 3) Policy 8515, entitled "Formulation of Administrative Regulations" delegates to the Superintendent of Schools the formulation of administrative rules and regulations governing operation of the School District, but such rules and regulations must be consistent with policies adopted by the Board. Any rule change requires Board approval." (Johnson Dep. Ex. 8) Finally, Policy 6161.12, entitled "Use of Free Materials" provides that "free materials, including advertising materials that fulfill a legitimate purpose of the District curriculum may be accepted for classroom use, subject to the rules and regulations of the School District." (Johnson Dep. Ex. 6)

Johnson did not participate in either the mural or literature distribution decision alleged in the complaint, and does not recall the controversy regarding the distribution of literature. (Johnson Aff. ¶ 12; Johnson Dep., p. 23)

Analysis

I. Official Capacity Suits

Plaintiffs sued Superintendent Johnson and Principal Pulaski in their official capacities.[11] Generally, an official capacity suit is

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[11]Plaintiffs readily admit that this is not an individual capacity suit. There are no allegations that Johnson participated in the decision to deny the

another way of pleading an action against an entity of which the officer is an agent. *Smith v. Metropolitan School Dist. Perry Tp.*, 128 F.3d 1014, 1020 n.3 (7th Cir. 1997), *(quoting Nelson v. Temple Univ.*, 920 F. Supp. 633, 637 (E.D. Pa. 1996) (*citing Kentucky v. Graham*, 473 U.S. 159, 165-66, 105 S. Ct. 3099, 3104-05, 87 L. Ed.2d 114 (1985). Plaintiffs acknowledge this at page 9 of their response to defendants' motion for summary judgment: "[w]hat defendants fail to understand is that suits against Superintendent Johnson and Principal Pulaski in their official capacities are suits against Kenosha Unified School District No. 1 and George N. Tremper Senior High School." During oral argument on the pending cross-motions for summary judgment, plaintiffs' attorney admitted that the dismissal of these individuals is acceptable because the plaintiffs seek identical relief against the District and in the individual defendants. As the United States Supreme Court explained in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690 n. 55 (1978) (Monell), that there is no longer a need to bring official-capacity actions against local government officials because the local government itself can be sued directly for damages, injunctive relief or declaratory relief. Consequently, Johnson and Pulaski will be dismissed as a defendants.

II. District Liability

Next, the court examines the sufficiency of plaintiffs' claims in view of *Monell*. *Monell* holds that a plaintiff must show that the deprivation of civil rights was caused by some official custom or policy of the municipality. *Monell*, 436 U.S. at 694 (1978). Case law identifies three instances in which a municipality can violate a person's civil rights because of its policy: 1) an express

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request to paint the cross or distribute literature. Plaintiffs even include, as a proposed finding of fact, Johnson's testimony that he did not recall the controversy regarding the distribution of literature. (Johnson Dep. p. 23)

policy, that, when followed, deprives a person of his or her constitutional rights; 2) a widespread practice that, though not authorized by an express policy or written law, "is so permanent and well settled" as to constitute a "custom or usage" with the force of law; or 3) an allegation that the constitutional injury was caused by a person with "final policymaking authority." *Baxter v. Vigo County School Corp.*, 26 F.3d 728, 734-35 (7th Cir. 1994).

Consequently, plaintiffs must allege facts that, if proven, would provide an adequate basis for District liability. *See Gray v. County of Dane*, 854 F.2d 179, 182 (7th Cir. 1988). In addition to showing the existence of a policy or custom, plaintiffs must prove that a municipal policy or custom caused their injury. *Abbott v. Village of Winthrop Harbor*, 205 F.3d 976, 981 (7th Cir. 2000) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988)). There must be a sufficient causal link between the policy or custom and the constitutional deprivation. *Jones v. City of Chicago*, 787 F.2d 200, 203 (7th Cir. 1986). This is because municipalities are answerable only for their own decisions and policies; they are not vicariously liable for the constitutional tort of their agents. *Id.* And, the doctrine of respondeat superior does not apply. *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 735-36 (1989).

A. The Bible Club Mural

The complaint, filed February 3, 2000, identifies a single policy, section 5126.8, entitled INFORMATIONAL MATERIALS FOR STUDENTS. In paragraph 51 of the complaint and subsequent paragraphs, the plaintiffs refer to Policy 5126.8 as "The Policy." However, this policy states that it governs "distribution of materials intended as generally informational, as announcements of events of related interest to District staff or students, or announcements of other student recreational opportunities." Thus, on its face, this District policy

does not apply to murals or religious symbols.

In the absence of an express policy governing murals, plaintiffs must allege and prove that it was a widely accepted and known custom of the District to censor certain types of religious speech from school murals or that Pulaski had the final authority to decide whether to allow such expression in the school. But, there are no such assertions in the complaint. Allegations regarding the Bible Club's mural are set forth in paragraphs 17-40, 58-60, and 62. However, the only statements relevant to a *Monell* analysis are in paragraphs 58 and 62 which allege that "defendants' practice of censoring certain types of religious speech from the mural constitutes an unconstitutional abridgement of plaintiffs' affirmative rights to freedom of speech under the First Amendment to the Constitution" and that Pulaski was granted "unfettered discretion to grant or deny content of a mural."

Responding to defendants' arguments that the complaint does not set forth a valid claim for District liability, plaintiffs point to the District's policy designating the Superintendent and/or the Superintendent's designee to implement policy in the absence of any written policy. Policy 2210 provides in relevant part that:

> The principal is the chief administrative and instructional officer of the school and is directly responsible to the K-8 Coordinators for elementary and middle schools and the Executive Director of 9-12 Instruction of his/her designee for high schools. The principal is responsible for the administration of the total education program within the school. The principal will assume such other responsibilities as assigned by the Superintendent of Schools after consulting with the K-8 and 9-12 Instruction and the Assistant Superintendent of Instruction.

In addition, Policy 2440, entitled ADMINISTRATIVE LEEWAY

IN ABSENCE OF DISTRICT POLICY, grants the Superintendent of Schools/designee authority to use professional judgment where the School Board has not adopted policies or other guidelines for administrative action. Finally, Policy 8515, entitled FORMULATION OF ADMINISTRATIVE REGULATIONS delegates formulation of administrative rules and regulations governing operation of the School District to the Superintendent of Schools. However, such rules and regulations must be consistent with policies adopted by the Board. Any rule change requires Board approval.

Plaintiffs rely on Johnson's deposition testimony that Policy 2440 applies when there is no policy and that the principal has the authority to exercise professional judgment. (Johnson Dep. pp. 12, 44) In addition, Johnson's affidavit filed on February 28, 2000, in opposition to plaintiffs' motion for preliminary injunction, states that "pursuant to District Policy 2440, if any situation arises in the district where the district has not specifically adopted any policy or other guidelines, I/my designee have the authority to use our professional judgment to deal with the situation." (Johnson Aff. ¶ 9; Doc. #16)

Additionally, plaintiffs point to the letter sent by their attorney to Pulaski on October 7, 1999, with a copy to Johnson. This letter outlined the controversy regarding the mural and the legal authority plaintiffs' were relying on in support of their position. It is plaintiffs' submit that by failing to respond to the October 7, 2000, letter, Johnson ratified Pulaski's decision. Lastly, the plaintiffs argue that the school board has notice of this lawsuit and is aware of their claims, so that failure of the school board to act since the filing of this lawsuit has ratified the actions (or inactions) of Pulaski and Johnson.

In essence, plaintiffs argue *Monell* liability on several levels. They suggest that Pulaski and/or Johnson have final rulemaking

authority, suggest that Pulaski has a custom or practice of discriminating against the mural, and suggest that Pulaski's custom or practice has been ratified by the school district's inaction.

Plaintiffs misunderstand their burden to establish that a constitutional injury was caused by someone with "final policymaking authority. Their failure to allege such theory or raise a causal connection does not meet the notice requirement of Rule 8(a) of the Federal Rules of Civil Procedure. *See Baxter*, 26 F.3d at 735 (7th Cir. 1994) (holding that a complaint must first allege that the principal in his official capacity is a final policymaker). Moreover, whether a particular public official has "final policymaking authority" is a question of state law. *Jett*, 491 U.S. at 737; *Duda v. Board of Education of Franklin Park Public School Dist. No. 84*, 133 F.3d 1054, 1061 (7th Cir. 1998). In Wisconsin, the public schools of a unified school district are under the management, control and supervision of a school board. Wis. Stat. § 120.13(1)(a). School board members are the officers of the district. Wis. Stat. § 120.05. And while a school district administrator, principal or teacher designated by the school district administrator may make rules, it must be *with the consent of the school board.* Wis. Stat. § 120.13(b)(1) (emphasis added).

Hence, Wisconsin law dictates that the board is the final policymaker on the issue of what may be included in wall murals at George Tremper High School. The absence of a written policy regarding murals does not elevate Pulaski or Johnson to final policymaker status. At best, the absence of a policy allows the Superintendent or his designee to exercise professional judgment.

Policy 8515 grants Johnson the authority to formulate administrative regulation and allow the adoption of a rule and regulation where a policy is absent, but expressly requires that these rules and regulation be consistent with the policies adopted

by the Board. Any rule change must be made with board approval. There is no evidence in this record that Johnson participated in the decision banning the cross from the Bible Club's mural, approved the decision, or adopted rules or regulations regarding the cross on the mural. (Johnson Aff. ¶ 12) More importantly, there is no evidence that any member of the District's Board of Education participated in, approved of or otherwise ratified Pulaski's decision. *See Baskin v. City of Des Plaines*, 138 F.3d 701, 705 (7th Cir. 1998) (holding that a plaintiff seeking to establish a § 1983 claim against a municipality based upon a ratification theory must allege that a municipal official with final policymaking authority approved the subordinate's decision and basis for the decision).

Finding no grounds for concluding that Pulaski acted with final rulemaking authority, the court is similarly troubled by the assertion in plaintiffs' brief that Pulaski "obviously created a practice, a custom and therefore a policy by persisting in discriminating against the Bible Club mural." To state a claim based on government custom, plaintiffs must allege the existence of a "continuing, widespread, persistent pattern of unconstitutional conduct" by District employees, deliberate indifference or authorization of the conduct by policymaking officials after notice, and that the custom was the cause of the plaintiffs' injuries. *See Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649 (8th Cir. 1998).

Noticeably absent from the complaint is any allegation that Pulaski's decision with respect to the mural constituted District policy or custom or received the tacit approval of the board. *Baxter*, 26 F.3d at 735 (quoting *Sivard v. Pulaski County*, 17 F.3d 185, 188 (7th Cir. 1994) ("Boilerplate allegations of a municipal policy entirely lacking in any factual support that a policy does exist, are insufficient.").

Plaintiffs rely on *Steele v. Van Buren Public School District*, 845 F.2d 1492, 1496 (8th Cir. 1988), where a letter sent to board members seven months before the filing of the complaint exposed the district to liability. Board members in *Steele* expressed their support for the principal and urged the plaintiff to drop the issue. Unlike *Steele*, the plaintiffs at bar had no contact with the board until the board was served with the summons and complaint. Plaintiffs sent a letter to Pulaski with a copy to Johnson, then filed this lawsuit after concluding they would not receive the desired response. Pulaski testified in his deposition that he did not discuss the letter with an attorney or anyone on the school board. He simply gave the letter to his secretary for filing. (Pulaski Dep., p. 35) Without more, the District cannot be liable.

B. Literature Distribution Request

Turning to the literature distribution request, plaintiffs identify an express policy, District Policy 5126.8, entitled INFORMATIONAL MATERIALS FOR STUDENTS. The Policy provides:

> Policy
> Distribution of materials intended as generally informational, as announcements of events of related interest to district staff or students, or announcements of other student recreational opportunities are allowed.
>
> Rule
> 1. All such requests, including the copy to be distributed, will be screened and approved by the Superintendent/designee.
> 2. The District guidelines for distribution of these materials to students will be followed.
> 3. Exceptions to the prescribed guidelines will be cleared through the Superintendent/designee.

(Johnson Aff. Ex. B)

The complaint alleges that Pulaski presented Gernetzke with a copy of this policy and told her that it governed literature distribution in the school. The complaint further alleges that unidentified personnel at the school office gave Gernetzke copies of Policies 5126.8 and 6161.12, and told her that requests to distribute religious materials on campus would more than likely by denied. However, these allegations are not supported by the record.

First, Gernetzke testified in her deposition that she went to the district office to ask for the policy governing distribution of religious material. (Gernetzke Dep. p. 86) Although she can't remember who she talked with, a secretary made her a copy of Policy 6161.12. (*Id.* at p. 85-86) Gernetzke believes that the secretary's name began with a K. Johnson's secretary's name is Kathy. (Gernetzke Dep. p. 115; Johnson Dep. p.) However, no one in the office recalls having a conversation with Gernetzke regarding the policies (Johnson Dep., p. 53) And, Gernetzke did not talk to anyone else at the district office because she didn't think they were there. (*Id.*)

Second, the secretary did not give Gernetzke a copy of Policy 5126.8 as alleged in the complaint. (*Id.*) The only conversation recalled by Gernetzke in her deposition is the secretary's reference to a "designee." Gernetzke did not ask the secretary for the name of the designee. (*Id.* at p. 87) Furthermore, the record is devoid of evidence that the secretary told her that a request to distribute religious material on campus "would more than likely be denied" as alleged in paragraph 54 of the complaint.

Finally, Gernetzke testified in her deposition that she was given a copy of 5126.8 by Pulaski *after* the secretary gave her a

copy of 6161.12. Pulaski denies telling Gernetzke that District Policy 5126.8 governed her request. (Pulaski Aff. ¶ 20)

Assuming for purposes of summary judgment that Pulaski of office personnel handed Gernetzke Policy 6161.12 or 5126.8 and told her that it governed her request. Gernetzke never attempted to comply with its terms. She never identified the literature to be distributed, did not present Pulaski or office personnel with a copy of the literature, nor approach the Superintendent's designee, Kathy Barca, head of the District's Office of Special Projects to screen and approve her literature for distribution. (Johnson Dep., p. 21)

Regardless, neither policy applies. Policy 5126.8 states that the District guidelines for distribution of materials to students will be followed. The District has adopted Document 402 for the administration of Policy 5126.8. Document 402, entitled "Distribution Guidelines" states:

> Due to the number of requests for distribution in the schools of materials reflecting planned programs of community or private sponsorship, we have found it necessary to refine procedures for assisting worthy organization. Following are the guidelines and dates for distribution of materials ...

Document 402 provides for distribution through school mail and require that flyers or announcements be packaged in groups of 30 for "quick and easy teacher distribution to individual classes." The "general rule to be followed for distribution of materials to students is that information disseminated should be an extension of the curriculum of the school district."

When read with the accompanying regulation, Policy 5126.8 applies to the mass distribution of announcements and information

materials to District students from outside groups or individuals. Hence, when Pulaski denied Gernetzke's individual request to distribute literature, he was not acting pursuant to Policy 5126.8 or any other District policy. It follows that Policy 5126.8 could not have caused plaintiffs' injuries.

The same holds true for Policy 6161.12, entitled "Use of Free Materials," which states as follows:

> Policy
> Free materials, including advertising materials, that fulfill a legitimate purpose of the District curriculum may be accepted for classroom use, subject to the rules and regulations of the School District.
>
> Rule
> Free materials used for instructional purposes shall be subject to the same selection procedure and evaluation criteria as that used for purchased materials.

Because the District does not have a policy regulating student requests to distribute literature (Johnson Aff. ¶ 5), the next question is whether the plaintiffs have pled and established that the decision denying Gernetzke's literature distribution request was made by a person with final rulemaking authority or pursuant to a custom within the District. However, the answer is no. Plaintiffs failed to allege that Pulaski acted with final rulemaking authority, and there is no evidence in this record supporting such a finding.

Nonetheless, plaintiffs insist that there is a District policy or custom regarding student dissemination of literature. Pulaski testified in his deposition that he has a practice of not allowing individual student literature distribution to other student of a mass distribution nature. (Pulaski Dep. p. 42) In addition, he stated in

his affidavit that individual student dissemination of literature, pamphlets, etc. on Tremper grounds is not permitted. Generally, school-recognized student organizations are permitted to distribute certain literature, pamphlets, etc. at Tremper during the hunch hour with prior approval of either Pulaski or the school's Activities Director. Pulaski has taken the position that this is not a District policy or custom but his individual practice at Tremper. (Pulaski Aff. ¶¶ 21-22)

This record does not show that the District ratified or acquiesced in Pulaski's practice. Pulaski does not recall ever discussing Gernetzke's request with Johnson prior to the filing of this action. (Pulaski Dep. p. 44) Johnson did not participate in the literature distribution decision, and testified that he is only "somewhat familiar" with the procedure used by Pulaski to accommodate requests to distribute literature. (Johnson Dep. p. 51; Johnson Aff. ¶ 12) Absent proof of ratification or acquiescence to Pulaski's practices by the School Board, this court cannot find that a District custom or policy caused plaintiffs' injuries.

III. Equal Access Act

Next, defendants move for summary judgment on plaintiffs' equal access claim based on Pulaski's refusal to allow the Bible Club to include a cross on its mural near the school's cafeteria.[12] Generally, the Equal Access Act, 20 U.S.C. § 4071, *et seq*, requires public secondary schools receiving feral financial assistance and maintaining a limited open forum to grant equal access to student groups to meet for religious, political or philosophical purposes, if the school allows any non-curriculum related student group to meet at the school during non-

---

[12]For clarification purposes, the denial of the literature distribution request is not at issue with respect to the Equal Access claim.

instructional time. *See Westside Community Sch. V. Mergens*, 496 U.S. 226, 236 (1990).

During the February 20, 2001, hearing on the cross-motions for summary judgment, this court inquired whether Kenosha Unified School District No. 1 was federally funded such that it should be subject to the Equal Access Act. The court gave plaintiffs five business days to produce evidence that Kenosha Unified School District received federal funds. Plaintiffs timely file noted of defendants' admission of federal funding and motion for judicial notice of federal funding. Defendants concede that they previously admitted in their opposition brief to plaintiffs' motion for preliminary injunction that Kenosha Unified School District was federally funded. In addition, the United States Department of Education's web site demonstrates that the District receives federal funds and did so at the time period at issue in this dispute. (Http://web99.ed.gov/grant/grtawd00.nsf/). Thus, pursuant to Fed.R.Evid. 201(a)(2), the court will take judicial notice that the District receives federal funds.

Nevertheless, the court concludes that the Equal Access Act does not apply. The Act only protects meetings of non-curricular student groups. The term meeting is defined as: "those activities of student groups which are permitted under a school's open forum and are not directly related to the school curriculum." 20 U.S.C. § 4072(3). Courts interpreting the Act have found violations where school districts have refused access to groups when other non-curriculum groups were allowed to meet at that time, and where school districts have refused to officially acknowledge religious clubs. *See e.g. Ceniceros v. Board of Trustees of the San Diego Unified Sch. Dist.*, 106 F.3d 878 (9th Cir. 1997); *Pope v. East Brunswick Bd. Of Educ.*, 12 F.3d 1244 (3rd Cir. 1993).

Plaintiffs urge the court to adopt a definition of "meetings"

that would not be limited to a "spacial sense." In support of this position, plaintiffs cite *Mergens*, 496 U.S. at 236 (1990), where the Supreme Court held that the school's denial of official recognition to a Christian club constituted a violation of the Equal Access Act. The High Court stated:

> Respondents seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the Student Activities Program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair. We hold that Westside's denial of respondent's request to form a Christian club denied them "equal access under the Act." *Id.* at 247.

No authority beyond this cited language supports the definition urged by plaintiffs. Courts considering whether the Equal Access Act applies to requests to distribute religious tracts have held that such requests do not fall within the scope of conduct protected by the Act. *See Cark v. Dallas Indep. Sch. Dist.*, 806 F. Supp. 116 (N.D. Tex. 1992); *Thompson v. Waynesboro Area School District*, 673 F. Supp. 1379 (M.D. Penn. 1987).

Meeting opportunities guaranteed by the Act must be voluntary. *Thompson*, 673 F. Supp. At 1383; 20 U.S.C. § 4071(c)(1). Furthermore, section (f) provides expressly that the school, its agents and employees, retain the authority under the Act to maintain order and discipline on school premises, protect the well-being of students and faculty and to assure that attendance of students at meetings is voluntary. 20 U.S.C. § 4071(f). Gernetzke testified that the Bible Club's mural is located in the hallway to the commons area where "kids eat lunch" and "converse during the lunch hour." Thus, the area adjacent to the mural is a "gathering place." (Gernetzke Dep. p. 38) All Tremper students pass this area at one time or another during the day, and

perhaps more than tow or three times a day. (Gernetzke Dep. pp. 38-39)

It is indisputable that the Bible Club is a voluntary student organization at Tremper which meets regularly and is treated like other student organizations. (Pulaski Aff. ¶ 5; Gernetzke Dep. p. 11; Johnson Aff. ¶ 4; Bezotte Dep. pp. 86-88) However, the court is not persuaded that allowing members of a student club to paint a Christian cross in a school thoroughfare that students must traverse daily is voluntary "meeting" contemplated by the Act. Furthermore, it would strain commonsense for this court to conclude that merely applying paint to a flat wall constitutes a meeting covered by the Equal Access Act. In reaching this decision the court need not comment on the constitutionality of Dr. Pulaski's decisions at Tremper. It is sufficient to say that based upon the limited record, this court does not find a District policy or custom that caused plaintiffs' any injuries. Nor is the court persuaded that the Equal Access Act extended to the painting of a cross on a mural in a hallway near a school cafeteria.

Now, therefore,

IT IS ORDERED that plaintiffs' notice of defendants' admission of federal funding and motion for judicial notice of federal funding is granted.

IT IS FURTHER ORDERED that Dr. Michael Johnson and Dr. Chester Pulaski are dismissed as defendants in this case.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is granted.

IT IS FURTHER ORDERED that plaintiffs' motion for summary judgment is denied.

IT IS FURTHER ORDERED that this case is dismissed with prejudice.

Dated at Milwaukee, Wisconsin, this 28th day of March, 2001.

BY THE COURT

/s C.N. CLEVERT
C. N. CLEVERT
U.S. District Judge

APPENDIX C

20 U.S.C. §4071 - 4074 (the "Equal Access Act") states as follows:

Sec. 4071

(a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or the content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum-related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that–

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and

substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof–

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United

States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

Sec. 4072 Definitions of Common Terms

As used in this subchapter--

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

Sec. 4073 Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected

thereby.

Sec. 4074 Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

APPENDIX D

Policy 2210

THE BUILDING PRINCIPAL

The principal is the chief administrative and instructional officer of the school and is directly responsible to the K-8 Coordinators for elementary and middle schools and the Executive Director of 9-12 instruction or his/her designee for high schools. The principal is responsible for the administration of the total educational program within the school.

The principal will assume such other responsibilities as assigned by the Superintendent of Schools after consulting with the K-8 Coordinators, the Executive Directors of K-8 and 9-12 Instruction and the Assistant Superintendent of Instruction.

Appropriate placement and transfer practices for school administrators should enhance effective utilization of skills and abilities and the professional growth of individuals and the continued improvement of the district's schools and its children. These objectives can best be achieved through the provision of a variety of school assignments and experiences over a period of years, and the best possible matching of administrator strengths to identified needs of a particular school.

The Superintendent of Schools will be responsible to the Board for effective placement and transfer of school administrators. In making decisions on placement, the Superintendent will give consideration to:

- The needs of the school and district as perceived by the Board and central administration;
- The administrator's expressed preferences;
- Compatibility of administrative style among staff in the school;
- Opportunities provided for professional growth in the other school assignments
- Appropriate training to enable effective planning and educational continuity; and
- The needs of the schools as perceived by the site councils and staff
- Five to nine years service at one school.

To achieve the above, the Superintendent shall annually as part of the annual staffing, consider, then make reassignment of individual building administrators which fill some or all of the above criteria.

CROSS REF: 2140 - Other Personnel
2410 - Organizational Chart
2510 - Administrative Appointment

ADMINISTRATIVE REGULATIONS: None

REVISED: December 28, 1990
February 9, 1999

2440 ADMINISTRATIVE LEEWAY IN ABSENCE OF DISTRICT POLICY

(Amended 12/28/90)

Policy

In any situation which arises within the School District where the School Board has not adopted policies or other guidelines for administrative action, the Superintendent of Schools/designee, shall have the authority to use professional judgment.

5126.8 INFORMATIONAL MATERIALS FOR STUDENTS
(Affirmed 08/13/91)(Refer also to Policy 6161.12)

Policy

Distribution of materials intended as generally informational, as announcements of events of related interests to District staff or students, or announcements of other student recreational opportunities are allowed.

Rule

1. All such requests, including the copy to be distributed, will be screened and approved by the Superintendent/designee.
2. The District guidelines for distribution of these materials to students will be followed.
3. Exceptions to the prescribed guidelines will be cleared through the Superintendent/designee.

6161.12 USE OF FREE MATERIALS (Affirmed 09/24/91)

Policy

Free materials, including advertised materials that fulfill a legitimate purpose of the District curriculum may be accepted for classroom use, subject to the rules and regulations of the School District.

Rule

Free materials used for instructional purposes shall be subject to the same selection procedure and evaluation criteria as that used for purchased materials.

8515 FORMULATIONS OF ADMINISTRATIVE REGULATIONS (Reaffirmed 5/25/93)

Policy

The School Board shall delegate to the Superintendent of Schools the formulation of administrative rules and regulations governing the operations of the School District.

Such rules and regulations shall be consistent with policies adopted by the Board. Any rule change will be made with Board approval.

ADMINISTRATIVE REGULATION

DOCUMENT 402

DISTRIBUTION GUIDELINES

Due to the number of requests for distribution in the schools of materials reflecting planned programs of community or private sponsorship, we have found it necessary to refine procedures for assisting worthy organizations. Following are the guidelines and dates for distribution of materials

Guidelines for distribution through school mail:

- Permission must be received from Superintendent/designee for the distribution or posting of materials to students and staff in schools.
- A general rule to be followed for distribution of materials to students is that information disseminated should be an extension of the curriculum of the School District.
- Requests for distribution and/or posting of advertising materials for businesses will not be approved.
- All requests for distribution and posting must be in accordance with the District School Board Policies.

Packaging of Materials:

- Individual take-home announcements for students or other appropriate flyers must be packaged in groups of 30 for quick and easy teacher distribution to individual classes. Flyers or announcements delivered to schools in bulk (without packaging) will not be distributed.
- Delivery of packaged materials for distribution to schools will ordinarily be the responsibility of the organization wanting this service. However, if this is not possible, properly prepared materials may be disseminated from the Educational Support Center through the Office of School

Management.

- Informational flyer announcements to teachers only must be packaged in sufficient quantities so that all intended staff may receive one.

Times for Distribution:

Fall Distribution - The fourth week in August for distribution in the second week of school.

- Organizations wishing to have fall schedules or announcements normally taking place during September, October, November, or December, should make plans to have these materials printed and packaged and ready for distribution by the fourth week in August.

January Distribution - The third week in December for distribution the first week in January.

- Organizations wishing to have mid-winter schedules or announcements normally taking place during January, February or March, should make plans to have these materials printed and packaged and ready for distribution by the third week in December.

Spring Distribution - The third week in March for distribution during spring and summer.

- Organizations wishing to have spring schedules/announcements normally taking place during the latter part of March, April, May and the summer months, should make plans to have the materials printed and packaged and ready for distribution by the third week in March.

Supreme Court, U.S.
FILED
MAR 22 2002
CLERK

No. 01-1181

In The

Supreme Court of the United States

SHARON GERNETZKE, *et al.*,

Petitioners,

v.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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5488

PARTIES TO THE PROCEEDING

Petitioners Sharon Gernetzke and Joseph Bezotte, by and through his parent and guardian, Doreen Bezotte, were, at all times relevant, students at George N. Tremper High School in Kenosha, Wisconsin and members of a student Bible Club. Sharon Gernetkze graduated in June of 2000.

Dr. Michael Johnson and Dr. Chester Pulaski were defendants in the proceedings below. Petitioners' claims against Johnson and Pulaski were dismissed by the District Court as redundant claims against Kenosha Unified School District No. 1 and their dismissal has not been challenged on appeal. Although Drs. Johnson and Pulaski remain identified in the caption as respondents, technically, they are not. The sole respondent before this Court is Kenosha Unified School District No. 1 ("the District").

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STATEMENT OF THE CASE

The United States District Court for the Eastern District of Wisconsin accurately set forth the pertinent facts in this case. Pet. App. B, at 12a-20a. These findings of fact were not disputed on appeal.

I. CLARIFICATION OF RECORD

The "facts" recited in the Petition bear modest resemblance to the record facts below. Petitioners make a number of assertions in their Statement of the Case that are either incomplete, incorrect or mischaracterize the record.

For example, Petitioners assert that Pulaski (the principal at Tremper High School) designated walls at the school for student murals in "1998." Pet. at 1. Contrarily, this designation was made "four or five" years prior to 2000 (i.e. 1995 or 1996). Further, Petitioners suggest that they received permission to paint a mural prior to designing their mural in 1998-99. Pet. at 1. Actually, the Bible Club designed the mural *before* its submission to Pulaski for approval.

In referring to Pulaski's decision to deny the inclusion of a large cross on the Bible Club mural (Pet. at 2) Petitioners fail to state *all* of the reasons why he made this decision, including his concerns that the permanent affixation of a large cross on Tremper's wall, an admitted Christian symbol, would: (1) violate the Establishment Clause, promote Christianity and possibly expose the District to litigation and create controversy in the school; (2) cause disruption in the school; and (3) require equal access on the wall to other controversial expressions including those of a Satanic or Nazi nature which would

further create disruption in the school and possibly threaten the safety of the school and Bible Club members. Pulaski approved the design except the inclusion of the cross. *See* Pet. App. B, at 14a-15a.

Petitioners also assert that in the fall of 1999, Sharon Gernetzke asked Pulaski if she could "distribute religious literature on campus to willing recipients during non-instructional time." Pet. at 2. The latter assertion is false. In the fall of 1999, Sharon Gernetzke asked Pulaski if she could distribute religious literature at Tremper, but she did not indicate that she wanted to distribute them to "willing recipients during non-instructional time." Further, Gernetzke did not show Pulaski a copy of the proposed literature and, in fact, he had no specific information as to its contents or appearance. *See* Pet. App. B, at 17a.

Petitioners also assert that Pulaski denied her request "*largely* because the literature was religious." Pet. at 2 (emphasis added). This is a mischaracterization of the record. Pulaski denied Gernetzke's request for several reasons including the fact it was an "individual" rather than a student organization-related request and it was religious.

It was Pulaski's practice to prohibit individual distribution of literature, publications, pamphlets, etc. on Tremper grounds irrespective of whether it was secular or religious literature. On the other hand, it was Pulaski's practice to allow student organizations to distribute literature during the lunch hour with prior approval. *See* Pet. App. B, at 18a.

Gernetzke's meeting with Pulaski regarding the distribution of materials was not discussed with the Bible Club; nor did the Bible Club designate Gernetzke as the

person to see Pulaski regarding the distribution of religious literature. Gernetzke stated she made the request for herself. *Id.* at 17a.

Petitioners also assert that the District enacted several policies that "attempt to regulate literature distribution in schools." Pet. at 3. This is also untrue. Respondents have always maintained (and the District Court agreed) that the District does not have a policy regulating literature distribution in its schools. Pet. App. B, at 30a. Rather, it was Pulaski's individual actions which were at issue in this case and, since this was an official capacity case, the issue presented below was whether those actions were attributable to the District under *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978).

District Policy 5126.8 (the only allegedly offending policy alleged in Petitioners' Complaint) was enacted to regulate the mass distribution of informational materials to District students, such as take-home announcements and mailings, from outside groups or individuals. The District maintained, and the District Court agreed, the policy did not apply to Gernetzke's request. Pet. App. B, at 18a-19a, 29a.

Regardless, Policy 5126.8 requires that a copy of the proposed literature be screened by the Superintendent or his designee. The Superintendent's "designee" for purposes of applying this policy is the head of the District's Office of Special Projects, not Pulaski or any other principal. Even if 5126.8 had applied to her request (as Petitioners contend), Gernetzke failed to comply with its terms in that she never submitted a copy of the proposed literature to either the Superintendent or the Office of Special Projects (or Pulaski for that matter). Pet.

App. B, at 29a. In any event, Pulaski was not acting pursuant to this policy when he denied Gernetzke's literature distribution request, therefore, there was no "causal connection" between Policy 5126.8 and Pulaski's decision. Pet. App. B, at 30a.

Further, District Policies 2210, 2440, 6161.12,[1] 8515 and Document 402 (which speak for themselves) were not enacted nor do they "attempt" to regulate literature distribution in District schools.

Policy 2210 merely states that a principal is the chief administrative and instructional officer of his/her school. Pet. App. D, at 40a. This policy has nothing to do with literature distribution. Under Policy 2440, the Superintendent (or his designee) has authority to "use professional judgment" in situations where the District's School Board has not adopted any applicable policies or guidelines. Pet. App. D, at 42a. Policy 8515 merely gives the Superintendent the authority to formulate administrative rules "consistent with" Board policies and with Board approval. Pet. App. D, at 45a. Document 402 was adopted to administer Policy 5126.8 and regulate bulk materials though the school mail system. Pet. App. B, at 29a.

On their face, none of these policies attempted to regulate student literature distribution at District schools. Further, none of these policies regulated symbols, religious or otherwise, in District schools.

Petitioners also allege that Pulaski is the Superintendent's "designee" having authority to approve/disapprove student literature distribution

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[1] Petitioners conceded in oral argument before the District Court that Policy 6161.12 had no application in this case.

requests at Tremper. Pet. at 3. Pulaski is not the Superintendent's "designee" under Policy 5126.8. Pulaski is the Superintendent's designee regarding student literature distribution at Tremper under Policy 2440 which only gives him authority to use "professional judgment" where the school board has not adopted a written policy. Under this policy, Pulaski only had the discretion to make a "professional judgment" with regard to literature distribution on his campus.

Petitioners allege that Pulaski "believes that everything the school allows, it automatically endorses." Pet. at 4. Pulaski's actual statements were that he believed that the cross on the mural would "cross that line between church and state within the schoolhouse." He also stated that he sees the murals "as an expression of the school" and with or without a disclaimer sign, students and visitors "would not necessarily make the connection [between the sign and the mural]." He also stated his belief that the school endorses those "clubs" it allows to be on campus and, "generally speaking," believes that the school endorses the literature its clubs pass out.

Petitioners' Statement fails to mention that the Bible Club mural is very large (54 by 62 inches in size) and is located in a hallway of the school where "everybody travels." Students must pass the mural to get to the lunch rooms, commons and classes, gym and auditorium. All students must pass the mural at one time or another (and possibly two or three times) during the day. Pet. App. B, at 15a.

The Bible Club mural has been vandalized by graffiti on three occasions since completed. One defacement was a pentagram symbolizing witchcraft. During Pulaski's tenure at Tremper, the student body has included admitted Satanists and Neonaziists. Gernetzke conceded that Pulaski's concerns for Bible Club members' safety were "legitimate." Pet. App. B, at 16a.

Additionally, in April or May of 1999 (after the student shootings at Columbine High School) several students in trench coats approached Tremper's Activities Director, Damon Weiss. The students stated that since the Bible Club had put up the mural they would like to put up one with a swastika. Weiss concluded the students were "skinheads." Pet. App. B, at 16a-17a.

It is undisputed that Dr. Johnson did not participate in either the mural or literature distribution decisions alleged in the complaint.

REASONS FOR DENYING THE WRIT

I. ISSUES NUMBER 1-3 ARE NOT PROPERLY BEFORE THIS COURT

Three of the questions presented in the Petition were not raised in the Court of Appeals and, therefore, are not properly before this Court. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, 67 L. Ed. 2d 287, 101 S. Ct. 1146 (1981). They are as follows:

1. Whether the requirements of a "custom, policy or practice" announced in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) applies to an action brought against a governmental official for prospective relief only?

This is a new theory advanced by Petitioners for the first time before this Court. The issue of whether Petitioners had alleged and proven a basis for government liability under *Monell* was squarely before both the District Court and Seventh Circuit. Petitioners failed to argue to either court that *Monell's* policy or custom requirement did *not* apply to their claims for prospective relief in accordance with the Ninth Circuit's holding in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989). In fact, they conceded below that *Monell* was the "defining case regarding suits against local government bodies" and argued that they had satisfied *Monell's* requirements for District liability. Petitioners never made any distinction between the various types of relief sought in the Complaint.

2. Whether, pursuant to 42 U.S.C. §1983, governmental entities may be held liable under a *respondeat superior* theory of liability for violations of constitutional and statutory rights when their employees make decisions the entity authorizes them to make?

This is also a new theory advanced by Petitioners for the first time before this Court. Petitioners never argued below that a *respondeat superior* theory of liability should attach in this case. Pet. at i. Petitioners also never argued that the District enacted policies whereby it consented to the imposition of *respondeat superior* liability. Pet. at 16. Contrarily, Petitioners agreed that *Monell* was the "defining case" for government liability and argued they had satisfied its "policy or custom" requirements. Having failed in their proof requirements below, Petitioners now argue for the first time that *Monell* must be readdressed to impose *respondeat superior* liability.

3. Whether the terms "order and discipline" found in Section 4071(f) of the Equal Access Act incorporate a "heckler's veto" into the Act and thereby allow school officials to censor a noncurriculum-related student club because other students may disagree with the message conveyed by the club?

The issues of whether the Equal Access Act authorized the District to maintain order and discipline, insure that attendance at meetings was voluntary and prohibit meetings that interfered with the orderly conduct of educational activities was squarely before the Seventh Circuit. Pulaski's concern that the Bible Club mural would cause disruption at the school was squarely before the Seventh Circuit.

There was never any argument raised that the cross on the mural must "materially and substantially interfere" with school discipline before Pulaski could exercise any discretion to prohibit the activity. More specifically, no argument was ever raised that under the Second Circuit's analysis in *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2nd Cir. 1996), religious club activity could be restricted only when it "materially and substantially" interfered with the requirements of appropriate discipline in the school.[2]

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[2] This omission is particularly difficult to reconcile since Petitioners' counsel filed an amicus curiae brief in the *Hsu* case and, therefore, was fully aware of its possible implications.

II. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE NINTH CIRCUIT'S HOLDING IN *CHALOUX*

In a transparent attempt to capture this Court's attention, Petitioners argue for the first time that the Seventh Circuit's ruling regarding their §1983 claims conflicts with the decision of the Ninth Circuit Court of Appeals in *Chaloux v. Killeen,* 886 F.2d 247 (9th Cir. 1989). Pet. at 6-11. Petitioners' reliance on *Chaloux* is misplaced and has not been properly preserved for Supreme Court review.

As a result of Petitioners' failure to argue that *Monell* was applicable only to their damage claims and *Chaloux* to their claims for prospective relief, the Seventh Circuit specifically noted that it need not "take sides" as to whether the predominant view of *Monell* applied. *Gernetzke v. Kenosha Unified Sch. Dist. No. 1,* 274 F.3d 464, 468 (7th Cir. 2001). Petitioners are foreclosed from now arguing otherwise to this Court.

Petitioners' argument is also moot or will shortly become moot before this case is considered by the Supreme Court. Sharon Gernetzke graduated from Tremper High School in June of 2000. Joseph Bezotte no longer attends Tremper and it is anticipated he will graduate from the District in June of 2002.

Graduation renders any claims for equitable relief moot. *Board of Sch. Comm'rs v. Jacobs,* 420 U.S. 128, 129, 43 L. Ed. 2d 74, 95 S. Ct. 848 (1975). *See also Cole v. Oroville Union High Sch. Dist.,* 228 F.3d 1092 (9th Cir. 2000). Further, the "capable of repetition, yet evading review" exception to mootness will not apply because neither of the students will be subject to Pulaski's practice nor any other District policy in the future and an award of

damages means any legal issues will not "evade review." *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1297 (7th Cir. 1993) (citing *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 5 n.3, 125 L. Ed. 2d 1, 113 S. Ct. 2462, 2464 n.3 (1993)). Gernetzke's claims for prospective relief are moot and Bezotte's will be moot by the time this case is ready for Supreme Court review.

Petitioners' contention that the Seventh Circuit's decision conflicts with the Ninth Circuit is also without merit. The Petition noticeably fails to recognize that, unlike the facts presented in *Chaloux*, Petitioners' Complaint *does* allege a claim for damages. On its face, the stated issue as to whether *Monell* "applies to an action brought against a governmental official for prospective injunctive relief *only*" is inapplicable here. Pet. at i (emphasis added). The Seventh Circuit's decision is limited to the facts presented and is not, therefore, at odds with *Chaloux*.

In *Chaloux*, *Monell* did not apply because, unlike *Monell*, "*solely* a claim for prospective relief" was presented. 886 F.2d at 250 (emphasis added). That is not the case here. *See also Jordan by Jordan v. Jackson*, 15 F.3d 333, 338 n.2 (4th Cir. 1994) (*Chaloux* does not apply where complaint also seeks nominal damages).

Unlike *Chaloux*, the imposition of liability in the instant case does carry with it a "threat of fiscal liability." *Chaloux*, 886 F.2d at 251. To the extent that this Court seeks to decide the issue of whether *Monell* does not apply to a suit for prospective injunctive relief only, this is not the proper case. *See also Barrett v. Harwood*, 189 F.3d 297 (2nd Cir. 1999); *Greensboro Professional Fire Fighters Ass'n v. City of Greensboro*, 64 F.3d 962 (4th Cir. 1995); *Church v. City of Huntsville*, 30 F.3d 1332 (11th Cir. 1994);

Adkins v. Board of Educ., 982 F.2d 952 (6th Cir. 1993); and *Nix v. Norman*, 879 F.2d 429 (8th Cir. 1989) where *Monell* was also applied in cases involving both claims for damages and injunctive relief.

Another case cited by Petitioners, *Santiago v. Miles*, 774 F. Supp. 775, 792 (W.D.N.Y. 1991), is inapposite because it too involved a claim for prospective relief only, not damages. Pet. at 8. The same is true with respect to *Nobby Lobby, Inc. v. City of Dallas*, 767 F. Supp. 801, 809-810 (N.D.Tex. 1991), *aff'd on other grounds*, 970 F.2d 82 (5th Cir. 1992) ("Monell does not apply . . . where Plaintiff seeks only prospective injunctive and declaratory relief against the City . . . and there is no threat of municipal financial liability.") and *Reynolds v. Giuliani*, 118 F. Supp. 2d 352 (S.D.N.Y. 2000) which are also cited by Petitioners. Pet. at 8. *But see Leary v. Daeschner*, 228 F.3d 729, 740 n.4 (6th Cir. 2000); *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 997 (11th Cir. 1990) and *United States v. Commonwealth of Pennsylvania*, 902 F. Supp. 565 (W.D.Pa. 1995), *aff'd*, 96 F.3d 1436 (3rd Cir. 1996), where *Monell's* policy or custom requirement applied in actions seeking only prospective injunctive relief.

Petitioners argue that the Ninth Circuit applied the *Chaloux* rule in *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469 (9th Cir. 1993) even though the plaintiff had "included additional claims for backpay and damages." Pet. at 8. That is not true. The only issue before the Ninth Circuit was whether the plaintiff was entitled to retrospective relief in the form of reinstatement and backpay. Such remedies, the court stated, *were* subject to *Monell's* policy or custom requirement. 995 F.2d at 1472. Although the court cited the *Chaloux* rule in dicta, it was factually inapplicable to the issues raised on appeal. *Id.* at 1472 n.1.

The Seventh Circuit's decision does not conflict with *Chaloux* and its progeny and is consistent with the Second, Fourth, Sixth and Eleventh Circuits. Even if there were a conflict (which there is not) Petitioners have waived it on appeal.

III. THE SEVENTH CIRCUIT'S CONCLUSION THAT PETITIONERS HAD NOT PROVEN A CASE FOR DISTRICT LIABILITY UNDER §1983 IS CONSISTENT WITH SUPREME COURT PRECEDENT

As the Seventh Circuit aptly noted, had Petitioners named Johnson and Pulaski in their individual (as opposed to official) capacities, they would not be facing *Monell's* threshold requirements. Pet. App. A, at 4a. In choosing to sue Johnson and Pulaski in their official capacities only, Petitioners knowingly subjected themselves to the *Monell* requirement for government liability.

Petitioners' ill-conceived argument that the Seventh Circuit's decision "insulates" the District from liability and "abuses" the *Monell* doctrine is disingenuous. Pet. at 11. Petitioners' "nightmare," if any, is due to their own failure to allege and prove the threshold requirements for local government liability pursuant to Supreme Court precedent.[3]

The Seventh Circuit's holding was based upon and is consistent with *Monell* where the Supreme Court rejected

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[3] The District, in turn, would have been obligated to indemnify Johnson and Pulaski for any damages assessed against them in their individual capacities as a result of actions committed within the scope of their employment. §895.46(1)(a), Wis. Stats. Resp. App. 1.

the doctrine of *respondeat superior* liability and established the touchstone of a §1983 action against a governmental unit as an "allegation that official policy *is responsible for* a deprivation" of constitutional rights. *Monell*, 436 U.S. at 690 (emphasis added). Pet. App. A, at 5a-6a.

The Seventh Circuit, following Supreme Court precedent, held that there can be no governmental liability under §1983 unless it is proven that such a policy *caused* the alleged injuries. Pet. App. A, at 6a. *See City of Canton v. Harris*, 489 U.S. 378, 385, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986); and *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985).

Any other conclusion, this Court has stated, "would be inconsistent with the principles underlying §1983." *Pembaur*, 475 U.S. at 480. The Seventh Circuit appropriately stated:

> Respondeat superior . . . makes an employer liable even if faultless for the torts its employees commit in the course of their employment.

Pet. App. A, at 5a-6a.

Nevertheless, that is the exact conclusion sought by Petitioners. Petitioners seek to nullify twenty-four years of Supreme Court precedent rejecting *respondeat superior* principles to governmental liability under §1983:

> The grant of authority to use discretion, no matter how small a grant, should lead to liability for the school district . . .

Pet. at 15.

Petitioners' argument is factually and legally meritless. Other than citing to several legal articles and

dissenting opinions criticizing *Monell*, in general, Petitioners have cited no precedential authority favoring the imposition of *respondeat theory* of liability in this case. Petitioners' argument, in fact, conflicts with Supreme Court precedent. *See Pembaur*, 475 U.S. at 481-82 (authority to exercise discretion does not give rise to municipal liability) (citing *Tuttle*, 471 U.S. at 822-24). The plurality in *Praprotnik* stated:

> If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from respondeat superior liability.

485 U.S. at 126. *See also Radic v. Chicago Transit Auth.*, 73 F.3d 159, 161 (7th Cir. 1996).

Based on the overwhelming statutory and case law supporting the Seventh Circuit's decision, it is not surprising Petitioners have failed to cite a single case supporting their position that delegation of authority to use "professional judgment" "is akin to a consent by the School Board to a *respondeat superior* liability." Pet. at 16.

All employees, absent any policy addressing a specific situation, have implicit authority to use "professional judgment" while executing their job responsibilities. Such "authority" is not tantamount to official policy directing violations of the First Amendment.

The District does not consent to the imposition of *respondeat superior* liability under Policy 2440 by granting Dr. Johnson/his designees to "use professional judgment" in situations where there is no applicable District policy. Pet. App. D, at 42a. Contrarily, if Johnson or his designees exercise their professional judgment in an unconstitutional manner, this Court has stated that the District would not automatically be liable under §1983,

for liability would then rest on *respondeat superior*. *Canton*, 489 U.S. at 387.

Petitioners' attempts to minimize the broad-reaching effects of their argument by distinguishing the actions of Johnson and Pulaski from other employees or administrators is illogical. Pet. at 16. One can envision the struggle courts would face in determining who has discretionary "authority" to make a particular decision and who does not. Conceivably, many employees will have discretion to make the same decision. As the Seventh Circuit aptly stated:

> [Petitioners' argument] would collapse direct and derivative liability. Every public employee, including the policeman on the beat and the teacher in the public school, exercises authority ultimately delegated to him or her by their public employer's supreme governing organs. . . . for if a police department or a school district were liable for employees' actions that it authorized but did not direct, we would be back in the world of respondeat superior. . . . Delegation is not direction; authorization is not command; permission does not constitute the permittee the final policymaking authority.

Pet. App. A, at 7a-8a (citing *Praprotnik*, 485 U.S. at 126).

Petitioners do not argue that the Seventh Circuit erred in holding that Petitioners had failed to prove a "custom"[4] or "final policymaker"[5] theory of liability

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[4] Petitioners do not raise any "custom" theory of recovery before this Court other than to make the conclusory statement that Pulaski's "custom" had been in effect for eleven years. Pet. at 15. This Court has no obligation to consider an issue merely raised, but not developed. *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 697 (7th Cir. 1991). Such an argument would

under *Monell*, but contend that Policy 5126.8 provides the requisite causal nexus between Pulaski's literature distribution decision and the District. Pet. at 12. This argument was dismissed by both lower courts.[6]

Regardless, it is uncontroverted that Pulaski was not acting pursuant to this policy when he made this decision. In a sworn affidavit, Pulaski stated:

> I never told Sharon Gernetzke that District policy 5126.8 governed her request to distribute literature . . . The practice [of permitting school-recognized student organizations to distribute literature . . . during the lunch hour] . . . is not a

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nonetheless fail because there is no allegation in the Complaint or proof that Pulaski's actions were pursuant to any "widespread practice" which was "so permanent and well settled" as to constitute District custom with "the force of law." *See Monell*, 436 U.S. at 694. Petitioners never even alleged a "custom" theory of liability. *See Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998). Nor is there any proof of any knowledge or awareness of any such "custom" and its consequences by the school board. *Denno v. School Bd.*, 218 F.3d 1267, 1277 (11th Cir. 2000).

[5] Petitioners also do not raise a "final policymaker" theory of liability in the Petition other than to state, without any support, "The Superintendent and his or her designee (Principal Pulaski in this case) have been given final policymaking authority regarding the distribution of literature." Pet. at 13. Likewise, a "final policymaker" theory of liability would fail because it was never even pled. *See Baskin v. City of Des Plaines*, 138 F.3d 701, 705 (7th Cir. 1998). Whether a public employee has "final policymaking authority" is a question of state law. *Praprotnik*, 485 U.S. at 123. In Wisconsin, a public school district's "final policymaker" is its school board. *See* §§120.05, 120.13(1)(a)-(b) and 120.44, Wis. Stats. Resp. App. 2-8.

[6] Petitioners did not contest before the Seventh Circuit the District Court's finding that Policy 5126.8 did not apply to the cross on the mural request.

> District policy or custom, but my individual practice at Tremper. When I made the decision to deny Sharon Gernetzke's vague request to "massively" distribute literature, I was not acting pursuant to any District policy or custom. In my opinion, the District does not have a policy regarding student distribution of materials.

The District Court correctly determined Policy 5126.8 did not apply to Gernetzke's request; the District did not have a policy regulating student requests to distribute literature; Policy 5126.8 did not "cause" Petitioners' purported injuries and, undisputedly, Gernetzke did not comply with its terms. Pet. App. B, at 29a-31a. Further, Johnson stated that Document 402 relates to Policy 5126.8 and there is no proof that the District has ever administered Policy 5126.8 outside of Document 402. It is undisputed that there was no affirmative link between either of Pulaski's decisions and Policy 5126.8 or any other District policy. The Petition does not even raise any arguments regarding Pulaski's mural decision.

The Petition also makes some factual allegations that are not supported by the record and mislead this Court. For example, Petitioners allege Johnson "was fully aware" of Pulaski's "longstanding practice of the school" and he "agreed" with the decision and gave his "full approval."[7] Pet. at 12, 14, 15. This is untrue. Johnson

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[7] Petitioners do not explain why these allegations, notwithstanding their inaccuracies, are relevant to this Court's consideration. In the event it is an attempt to raise a "ratification" theory of liability, such a theory (as the lower courts properly held) would also fail because Johnson was not a "final policymaker" within the meaning of *Pembaur*. Petitioners also never alleged that any District official with final

knew nothing of Dr. Pulaski's literature distribution practice (or his decision regarding Gernetzke's request) until *after* he was named as a defendant in this lawsuit. There were no conversations between the two on this issue until *after* the lawsuit was filed.

Further, Johnson's testimony, taken after the fact and within the context of this lawsuit, merely provides: " . . . in terms of supporting the decision, it has to be in a greater context. But on its face, I support Bud Pulaski." There is nothing in the record supporting Petitioners' contention that Pulaski's decision regarding Gernetzke's request was "with the full approval of the Superintendent." Pet. at 15.

Further, Johnson did not state Policy 5126.8 applies to situations where students bring in literature from the outside. Pet. at 12. Contrarily, he said no one could understand that Policy 5126.8 applied to students on campus. Johnson's statement is taken out of context. He merely "guessed" that it "could apply" to a student wanting to distribute literature from outside the campus "associated with a school activity" or representing the "same league."

Policy 5126.8 was intended to regulate the mass distribution of information materials to District students, such as take-home announcements and mailings, from outside groups or individuals. Pet. App. B, at 19a. There is no evidence in the record that Policy 5126.8 has ever been applied to a student request to distribute literature

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policymaking authority approved the principal's decision and the basis for it. *Baskin*, 138 F.3d at 701. Nor is there any proof that the school board had any knowledge of and approved Pulaski's actions.

on a school campus or that Policy 5126.8 has been applied to anything other than requests from "outside" groups or individuals seeking access to District schools. Further, Policy 5126.8 does not contain the individual vs. student organization distinction which was employed by Pulaski. Nor does it contain any reference to "religious" materials.

Petitioners also misrepresent that Pulaski was Johnson's designee to administer Policy 5126.8. Pet. at 13. In fact, the Superintendent's "designee" for purposes of applying this policy was the head of the District's Office of Special Projects, not Pulaski or any other principal.

Even if Policy 5126.8 applied to her request (which it did not), it is undisputed that Gernetzke failed to comply with the policy's requirements. She did not submit a copy of the proposed literature to either the Superintendent or the Office of Special Projects (or Pulaski for that matter). Pet. App. B, at 29a. Further, Pulaski stated he was not acting pursuant to this policy (or any other policy) when he denied Gernetzke's literature distribution request. Therefore, there was no "causal connection" between this policy and Pulaski's decision. Pet. App. B, at 30a.

The only designated authority Pulaski had to approve or disapprove literature distribution at Tremper was under Policy 2440, which provides that the Superintendent (or his designee) has authority to "use professional judgment" in situations where the District's School Board has not adopted any applicable policies or guidelines. Pet. App. D, at 42a. Under such policy, Pulaski had only the authority to use "professional judgment." There is nothing in this policy which precludes religious symbols or literature.

The Seventh Circuit whittled through Petitioners' ill-defined theories and reached a well-reasoned and well-supported decision based on the facts presented in this particular case. Obviously dissatisfied with the outcome of this case, the Petition seeks to create a controversy where there is none. Petitioners simply failed to allege and demonstrate any affirmative link for District liability under *Monell*. This case does not present any compelling reason for Supreme Court review.

IV. THE SEVENTH CIRCUIT'S APPLICATION OF §4071(f) OF THE EQUAL ACCESS ACT IS CONSISTENT WITH THE LANGUAGE AND INTENT OF THE STATUTE AND SUPREME COURT PRECEDENT

Petitioners contend that the Seventh Circuit incorporated a "heckler's veto" into the Equal Access Act which conflicts with the Second Circuit Court of Appeals' decision in *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2nd Cir. 1996). Pet. at 22. This is incorrect. The Seventh Circuit did not incorporate a "heckler's veto" into 20 U.S.C. §4071(f).

The Seventh Circuit held there was no proof of discrimination against the Bible Club (thereby affirming the District Court's grant of summary judgment to the District). Nonetheless, the court stated, Pulaski's decision was insulated from liability under the "order and discipline" defense in 20 U.S.C. §4071(f) which *"suggests"* that the principle in the heckler's veto cases "has not been carried over into the Equal Access Act." Pet. App. A, at 3a (emphasis added). The court did not make the definitive finding advanced by Petitioners in this regard.

Neither was the Seventh Circuit's comment outcome determinative. Initially, the court held that the Act was not violated by the refusal to place a cross on the Bible Club mural because the Bible Club was permitted to hold meetings on school grounds, announce its meetings and otherwise compete on equal terms with other nonreligious student groups. Pet. App. A, at 3a.[8] Further, in refusing the naming of a brand of beer on the S.A.D.D. mural, Pulaski showed he was prohibiting displays which he "reasonably believed likely to lead to litigation or disorder." *Id.*

Regardless, the Seventh Circuit's decision is consistent with *Mergens* where this Court stated that, although the Act limited a schools' authority to discriminate against students, " . . . we think that schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate." *Board of Educ. v. Mergens*, 496 U.S. 226, 240, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 98 L. Ed. 2d 592, 108 S. Ct. 562 (1988) and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986)).

This Court compared the "material and substantial" interference standards in §4071(c)(4) to *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 21 L. Ed. 2d

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[8] Without stating as much, the Seventh Circuit appears to give its tacit approval to the District Court's holding that the cross on the mural was not activity protected by the Act.

731, 89 S. Ct. 733 (1969)[9], but not to the "order and discipline" defense articulated in §4071(f). *Mergens*, 496 U.S. at 241.

Petitioners' reliance on *Hsu* is misplaced as the facts there involved a denial to officially form an after school religious club unless Christians and non-Christians alike were able to become officers in the club. The application of subpart (f) was not even before the court. Further, the Congressional record cited in *Hsu*[10] does *not* "make it clear" that the Act adopted the "materially and substantially" limitations in *Tinker* into §4071(f). *Hsu*, 85 F.3d at 867-68, n.28.

Consistent with the Seventh Circuit's decision, the *Hsu* court made it clear that *Tinker* "limits student freedom more sharply than the parties concede" and Congressional supporters of the Act did not intend it "to open the school doors to hate groups, cults, and *proselytizers*." *Hsu*, 85 F.3d at 867-68 (emphasis added). Further, the court cautioned, "Courts must be extremely reluctant to overrule the judgment of local administrators who are responsible for making these sensitive decisions." *Id.* at 873.

The Seventh Circuit also followed Supreme Court precedent when it acknowledged that the First Amendment has been "sensibly interpreted" to allow

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[9] The "heckler's veto" was recently modified by this Court in the context of a student religious activity case in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119, 150 L. Ed. 2d 151, 121 S. Ct. 2093 (2001) (" . . . a group's religious activity can be proscribed on the basis of what the youngest members of the audience might perceive.")

[10] The relevant Congressional record citations in *Hsu* include 130 Cong. Rec. 19,228; 19,232; 19,244; and 20,941.

school authorities greater control over the free speech of students than the state could exercise over adults engaged in political discussion in the non-school setting. Pet. App. A, at 3a-4a (citing *Hazelwood*, 484 U.S. at 266). In this regard, the Seventh Circuit stated, "Order and discipline are part of any high school's basic educational mission; without them, there is no education." Pet. App. A, at 4a.

The Seventh Circuit's decision is consistent with Supreme Court decisions in holding that a "school need not tolerate student speech that is inconsistent with its 'basic educational mission' . . . even though the government could not censor similar speech outside the school." Pet. App. A, at 4a (quoting *Hazelwood*). The Seventh Circuit also acknowledged *Hsu* in support of the proposition that the First Amendment has a broader scope than the Equal Access Act. *Id.*

This case is also fundamentally different than *Tinker* in that the permanent placement of a large, Christian cross on a public high school wall is not purely private speech (as were the armbands in *Tinker*). Distinguishably, the prominent placement of the cross would cause reasonable belief that Christianity bears the imprimatur of the District.

Further, it would impinge on the rights of others, including students, not to be the subject of religious coercion. As this Court aptly stated in *Hazelwood*:

> The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in Tinker – is different from the question whether the First Amendment requires a school affirmatively to promote particular speech.

484 U.S. at 270-71.

In the latter case (as is present here), "[e]ducators are entitled to exercise greater control" to assure that the "views of the individual speaker are not erroneously attributed to the school." *Id.* at 271. The school also retains the authority to refuse to sponsor student speech that might "reasonably be perceived to advocate drug or alcohol use" or "associate the school with any position other than neutrality on matters of political controversy." *Id.* at 272. Thus, the standard advanced by Petitioners from *Tinker* is not the same standard for "determining when a school may refuse to lend its name and resources to the dissemination of student expression." *Id.* at 272-73.

Section 4071(c)(4) provides that the Act will be complied with if "the meeting does not materially and substantially interfere with orderly conduct of educational activities within the school." This same language is not found in §4071(f).

Section 4071(f), when read within the context of the entire statute, is unambiguous and the Seventh Circuit correctly declined to apply the "material and substantial" requirements articulated in *Tinker* to this subpart. When considering subpart (f), Congressional supporters made it clear that discretion as to whether the acts of an organization would be disruptive to the purpose of a school would remain within the realm of school administrators. This holds true even if the organization is only going to engage in discussion and not any form of physical disruption. 130 Cong. Rec. 19,224 (statement of Sen. Hatfield). Further, the Act was intended to assure the rights of students to gather for religious purposes "so long as they do not infringe on the rights" of others. *Id.* at 19,228 (statement of Sen. Danforth).

The theory underlying subpart (f) was to make it clear that school administrators would have "inherent power to prevent the unrestrained, intensive, extreme psychological pressure which could be utilized by some religious groups to attempt to bring other kids within the religious community." *Id.* at 19,229 (statement of Sen. Danforth).

However, that is exactly the result sought by Petitioners. Their purported protected "expression" is to permanently affix a large, Christian symbol on a public high school wall which every student in the school (Christians and non-Christians alike) will have to pass several times each day. Petitioners cite to no cases holding that §4071(f) applies "only when they [the religious clubs] materially and substantially interfere" with appropriate discipline in the school. Pet. at 23.

The issue of whether Petitioners' First Amendment rights were violated was not before the Seventh Circuit nor is it before this Court. This is not a First Amendment claim, but an Equal Access Act claim. Petitioners ignore the difference.

In this case, Pulaski had reason to anticipate that a large, permanent, Christian symbol on a wall that every student would pass several times each day *would* "substantially interfere" with the work of the school or impinge upon the rights of others. This is not a case about student armbands (*Tinker*), but is more akin to *Hazelwood* where this Court made it clear that student expressions that might "reasonably perceive to bear the imprimatur of the school" is not limited to the standard articulated in *Tinker*. *Hazelwood*, 484 U.S. at 271. The Seventh Circuit's opinion is also consistent with *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 150 L. Ed. 2d 151, 121 S. Ct. 2093

(2001), where this Court applied a modified "heckler's veto" and held that "a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." 533 U.S. at 119.

While Pulaski has been principal at Tremper, students have included admitted Satanists and Neonaziists. The school has active white supremacists and there have been racial incidents. Pulaski "reasonably believed" that the large Christian cross would "bear the imprimatur" of District approval of the Christian religion. He was concerned that the cross would lead to litigation, cause disruption at Tremper and threaten the safety of Bible Club members. Gernetzke conceded Pulaski's concerns for Bible Club members' safety were "legitimate." Even without the cross, the Bible Club mural has been defaced on three occasions and prompted neo-nazi students to contemplate painting a mural with a swastika.

This is the exact scenario Congress intended to protect and expressly defer to the discretion of school administrators under §4071(f) as to whether the acts of an organization would be disruptive to a school.

V. THE LOWER COURTS' INTERPRETATION OF THE EQUAL ACCESS ACT IS CONSISTENT WITH SUPREME COURT PRECEDENT

Petitioners claim the Seventh Circuit's affirmation of the District Court is in conflict with the Supreme Court's decision in *Mergens*. Conversely, the lower courts' holdings are consistent with *Mergens* and the plain meaning of the statute.

Mergens involved the denial of a request to officially form a Christian student club. *See also Ceniceros v. Board of Trustees*, 106 F.3d 878 (9th Cir. 1997); *Pope v. East Brunswick Bd. of Educ.*, 12 F.3d 1244 (3rd Cir. 1993); and *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D.Cal. 2000). That is not the case here.

Unlike *Mergens*, it is undisputed in this case that the Bible Club *was* an officially recognized student club at Tremper and had utilized Tremper's facilities (including the public address system and bulletin boards) for more than eleven years. In fact, the District has a specific policy (1330.1) that authorizes noncurriculum-related student groups, like the Bible Club, to utilize District facilities for their meetings. Resp. App. 9. Thus, Petitioners' claim that the Bible Club was not granted "equal access" to student group "activities" rings hollow.

The District Court did not define the term "meeting" in the Act to only apply "in a spatial sense." Pet. at 28. That is purely Petitioners' terminology. Considering that "meetings" guaranteed by the Act must be "voluntary" and that under §4071(f) schools retain the right to maintain order and discipline, protect student and faculty well-being and "assure that attendance of students at meetings is voluntary," the District Court held:

> . . . the court is not persuaded that allowing members of a student club to paint a Christian cross in a school thoroughfare that students must traverse daily is *voluntary "meeting"* contemplated by the Act.

Pet. App. B, at 34a (emphasis added).

The Petition noticeably avoids any reference to the "voluntary" nature of "meetings" protected by the Act. In *Mergens*, this Court made clear that the Act's limitation of meetings to "noninstructional time" avoided the problem

of mandatory attendance which had previously been struck down by the Court. *Id.* at 251 (citing *Edwards v. Aguillard*, 482 U.S. 578, 584, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987)). Further, the recognized purpose underlying the Act was to end "discrimination by allowing students to meet and discuss religion before and after classes" and was not intended to "endorse or disapprove of religion." *Id.* at 245, 249 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (1985)).

Consistent with the lower courts' holdings, this Court has held that the pursuit of religious freedom does not trump the Establishment Clause under which government cannot "coerce anyone to support or participate in religion or its exercise . . . " *Lee v. Weisman*, 505 U.S. 577, 587, 599, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992) (citations omitted). *See also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 147 L. Ed. 2d 295, 120 S. Ct. 2266 (2000) (school sponsorship of a religious message is impermissible); *Stone v. Graham*, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (posting of Ten Commandments on public school wall violated Establishment Clause under three-prong test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971)); and *School Dist. of Abington Tp. v. Schempp*, 374 U.S. 203, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963) (recitation of Lord's Prayer violated Establishment Clause).

Regardless of whether the cross is on a Bible Club mural, the message to an objective observer would be that Christianity has the District's stamp of approval. Unlike *Mergens*, the permanent display of a cross on a public school wall would have violated the Establishment Clause pursuant to the three-prong analysis in *Lemon*. *See, e.g., Joki v. Board of Educ.*, 745 F. Supp. 823, 829

(N.D.N.Y. 1990) (permanent painting of crucifixion in public high school auditorium had the primary effect of endorsing Christianity).

The Act itself prohibits school "sponsorship" of any religious meetings, §4071(c)(2), meaning "school officials may not promote, lead, or participate in any such meeting, §4072(2)." *Mergens*, 496 U.S. at 253. Meetings are also limited to "noninstructional time" and student attendance must be "voluntary and student-initiated." §4071(b) and (c)(1). Further, schools cannot "require any person to participate in prayer or other religious activity" or "abridge the constitutional rights of any person." §4071(d)(2) and (7).

Petitioners do not seek merely access to the same activities as other school clubs, they seek to use such activities to promote and proselytize their Christian message in a coercive, involuntary manner to a captive audience of students. This is not the type of student activity envisioned by this Court in *Mergens*, but is the type of religious coercion the drafters of the Act sought to avoid.

During congressional debate, concern was raised that groups would seek to use the schools to proselytize for their particular religious beliefs and "claim the right to use school facilities to market, merchandise, and proselytize in connection with their own thoughts." 130 Cong. Rec. 19,227 (statement of Sen. Metzenbaum). This concern was minimized by the "voluntary" nature of the activities which were required to occur during non-school hours. *Id.* at 19,239 (statement of Sen. Durenberger). The "voluntariness" of the protected religious activity was emphasized:

> . . . it is extremely important to reemphasize the voluntary aspects of this amendment. There can be no requirement that a student participate in a group which is involved in prayer or other form of religious activity.

Id. at 19,245 (statement of Sen. Dole).

Inconsistent with the plain language of the statute and Supreme Court precedent, Petitioners seek broad application of the Act to hold an "involuntary" meeting which is not limited to non-instructional hours and requires a captive audience to "participate in such activity." The lower courts correctly held, consistent with the statute and *Mergens*, that the cross was not protected activity under the Act.

CONCLUSION

For the reasons set forth herein, Petitioners have not articulated any compelling reason to justify discretionary review by this court and Respondents Michael Johnson, Chester Pulaski and Kenosha Unified School District No. 1 respectfully request that this Court deny petitioners' Petition for Writ of Certiorari to review the Judgment and Opinion of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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Wis. Stats. 895.46 State and political subdivisions thereof to pay judgments taken against officers. (1) (a) If the defendant in any action or special proceeding is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee. Agents of any department of the state shall be covered by this section while acting within the scope of their agency. Regardless of the results of the litigation the governmental unit, if it does not provide legal counsel to the defendant officer or employee, shall pay reasonable attorney fees and costs of defending the action, unless it is found by the court or jury that the defendant officer or employee did not act within the scope of employment. The duty of a governmental unit to provide or pay for the provision of legal representation does not apply to the extent that applicable insurance provides that representation. If the employing state agency or the attorney general denies that the state officer, employee or agent was doing any act growing out of or committed in the course of the discharge of his or her duties, the attorney general may appear on behalf of the state to contest that issue without waiving the state's sovereign immunity to suit. Failure by the officer or employee to give notice to his or her department head of an action or special proceeding

commenced against the defendant officer or employee as soon as reasonably possible is a bar to recovery by the officer or employee from the state or political subdivision of reasonable attorney fees and costs of defending the action. The attorney fees and expenses shall not be recoverable if the state or political subdivision offers the officer or employee legal counsel and the offer is refused by the defendant officer or employee. If the officer, employee or agent of the state refuses to cooperate in the defense of the litigation, the officer, employee or agent is not eligible for any indemnification or for the provision of legal counsel by the governmental unit under this section.

* * *

Wis. Stats. 120.44 School board powers and duties. (1) A unified school district is a body corporate with the power to sue and be sued, to levy and collect taxes, to acquire, hold and dispose of property and to do all other things reasonable for the performance of its functions in operating a system of public education.

(2) The public schools of a unified school district shall be under the management, control and supervision of a school board. The school board shall have the powers and duties of the school board and annual meeting in a common school district. The officers of a unified school district have the powers and duties of the officers of a common school district. No annual meeting shall be held in a unified school district. The school board shall not, in

the name of the school district, issue bonds or incur other indebtedness without approval of the electors of the school district in any instance where the school board of a common school district is not authorized to do so.

Wis. Stats. 120.05 School board officials. (1) (a) The members of a school board shall be the officers of a school district.

(b) In the case of a 3-member school board, the school district president, treasurer and clerk shall constitute the school board. At the first election of a 3-member school board, the clerk shall be elected for a one-year term, the treasurer for a 2-year term and the president for a 3-year term.

(c) In the case of a school board with more than 3 members, the school board shall annually elect a school district president, vice president, treasurer and clerk from among its members at a school board meeting held on or within 30 days after the 4th Monday in April.

(d) A school district officer shall be a resident of the school district in which the officer serves. A school district officer who represents an apportioned area pursuant to a plan adopted under s. 120.02(2) shall be a resident of the apportioned area for which he or she is elected or appointed at the time the officer takes the oath of office. If a school district officer who represents an apportioned area ceases to be a resident of that area after beginning his or her term but continues to be a resident of the school district, the officer may continue to serve for

the balance of the term for which he or she was elected or appointed.

(2) If the territory of a common school district and a union high school district is identical, the school board of common school district shall constitute the school board of the union high school district.

(3) If the school district president, vice president, treasurer or clerk of any school board is unable to discharge the duties of the office due to disability or absence, the school board may appoint a person to discharge the duties of such a person until the disability or absence no longer exists. In the case of a 3-member school board the appointee shall be an elector of the school district. In the case of a larger school board the appointee for the president shall be the vice president and the appointee for the other officers shall be another school board member. The school board shall determine the compensation of such appointees. A person acting as school district clerk or school district treasurer shall have the powers of a deputy and shall take and file an official bond covering the person's acts unless the bond of such officer includes a bond for the officer's deputy. This subsection does not apply to vacancies caused by absence from the school district for a period exceeding 60 days covered by s. 17.03(4).

Wis. Stats. 120.13 School board powers. The school board of a common or union high school district may do all things reasonable to promote the cause of education,

including establishing, providing and improving school district programs, functions and activities for the benefit of pupils, and including all of the following:

(1) SCHOOL GOVERNMENT RULES; SUSPENSION; EXPULSION. (a) Make rules for the organization, gradation and government of the schools of the school district, including rules pertaining to conduct and dress of pupils in order to maintain good decorum and a favorable academic atmosphere, which shall take effect when approved by a majority of the school board and filed with the school district clerk. Subject to 20 USC 1415(k), the school board shall adopt a code to govern pupils' classroom conduct beginning in the 1999-2000 school year. The code shall be developed in consultation with a committee of school district residents that consists of parents, pupils, members of the school board, school administrators, teachers, pupil services professionals and other residents of the school district who are appointed to the committee by the school board. The code of classroom conduct may provide different standards of conduct for different schools and may provide additional placement options under s. 118.164(3). The code shall include all of the following:

1. A specification of what constitutes dangerous, disruptive or unruly behavior or behavior that interferes with the ability of the teacher to teach effectively under s. 118.164(2).

2. Any grounds in addition to those under subd. 1. for the removal of a pupil from the class under s. 118.164(2).

3. The procedures for determining the appropriate educational placement of a pupil who has been removed from the class and assigned a placement by the school principal or his or her designee under s. 118.164.

4. A procedure for notifying the parent or guardian of a minor pupil who has been removed from the class under s. 118.164(2).

(b) 1. In addition to rule-making authority granted school boards under par. (a), the school district administrator, or any principal or teacher designated by the school district administrator, may make rules with the consent of the school board.

2. The school district administrator or any principal or teacher designated by the school district administrator may suspend a pupil for not more than 5 school days or, if a notice of expulsion hearing has been sent under par. (c)4. or (e)4. or s. 119.25(2)(c), for not more than a total of 15 consecutive school days for any of the following reasons:

a. Noncompliance with rules adopted under subd. 1. or school board rules.

b. Knowingly conveying any threat or false information concerning an attempt or alleged attempt being made or to be made to destroy any school property by means of explosives.

c. Conduct by the pupil while at school or while under the supervision of a school authority that endangers the property, health or safety of others.

d. Conduct while not at school or while not under the supervision of a school authority that endangers the

property, health or safety of others at school or under the supervision of a school authority or endangers the property, health or safety of any employee or school board member of the school district in which the pupil is enrolled.

2m. In subdivision 2. c. and d., conduct that endangers a person or property includes making a threat to the health or safety of a person or making a threat to damage property.

3. Prior to any suspension, the pupil shall be advised of the reason for the proposed suspension. The pupil may be suspended if it is determined that the pupil is guilty of noncompliance with a school board rule or a rule adopted under subd. 1., or of the conduct charged, and that the pupil's suspension is reasonably justified. The parent or guardian of a suspended minor pupil shall be given prompt notice of the suspension and the reason for the suspension.

4. The suspended pupil or the pupil's parent or guardian may, within 5 school days following the commencement of the suspension, have a conference with the school district administrator or his or her designee who shall be someone other than a principal, administrator or teacher in the suspended pupil's school. If the school district administrator or his or her designee finds that the pupil was suspended unfairly or unjustly, or that the suspension was inappropriate, given the nature of the alleged offense, or that the pupil suffered undue consequences or penalties as a result of the suspension, reference to the suspension on the pupil's school record shall be expunged. The administrator, or

the administrator's designee, shall make a finding within 15 days of the conference.

5. A pupil suspended under this paragraph shall not be denied the opportunity to take any quarterly, semester or grading period examinations or to complete course work missed during the suspension period, as provided in the attendance policy established under s. 118.16(4)(a).

* * *

1330.1

CLASSIFICATION OF GROUPS USING SCHOOL DISTRICT FACILITIES OR GROUNDS AND RULES APPLICABLE TO EACH GROUP (Amended 5/28/91)

Policy

Permitted uses, availability and fees (where applicable) shall be determined by classification.

The School Board shall create and maintain a document entitled "Classifications of Groups Using School District Facilities." This document shall contain the names of all groups which have been granted use of District facilities and a copy of this document shall be provided to the Director of Facilities Services. Each group listed on this document shall be categorized under one of the seven (7) classifications set forth below. The School Board shall meet once a year to update this document.

In the event a group not classified on the document requests use of District facilities or grounds, a temporary determination regarding classification shall be made by the Director of Facilities Services pending Board review. Such group shall remain under the classification assigned by the Director of Facilities Services until the Board meets for its annual review of the document at which time the Board shall make the final determination regarding classification.

Rule

Classification of groups using school District facilities shall be as follows:

1. School Activity Groups

School Activity Groups are those groups which are related directly to an educational program or extra-curricular programs sponsored by the school, including athletic, cultural, and social group activities.

School Activity Groups will be permitted to use District facilities or grounds for any purpose which is related directly to an educational program or extra-curricular program sponsored by the school.

School Activity Groups will be permitted to use District facilities or grounds during non-school hours with special permission of the school principal.

School Activity Groups will be provided use of District facilities and grounds free of charge.

2. School-Related Activity Groups

School-Related Activity Groups are those groups not under direct sponsorship of the school but related to the schools, and include parent-teacher groups, 4-H groups, Scouts, parent booster groups, and any such groups as may be approved by School Board action for inclusion in this category.

School-Related Activity Groups will be permitted to use school District facilities or grounds for any purpose which directly or indirectly promotes the education, health, welfare, and personal growth of the District's students.

School-Related Activity Groups shall be allowed use of District facilities or grounds when such use does not interfere with the use of the facilities or grounds by School Activity Groups.

School-Related Activity Groups will be provided use of District facilities and grounds free of charge during normal custodial working hours. Activities after these hours may be assessed the actual custodial costs.

3. Non-curriculum Related Student Group

Non-curriculum Related Student Groups are those groups that meet for purposes unrelated to the body of courses offered by the school. A group is a Non-curriculum Related Student Group if the following conditions are true:

a. The subject matter of the group is not actually taught nor will be taught in the future in a regularly offered course of the school.

b. The subject matter of the group does not concern the body of courses as a whole.

c. Participation in the group is not required for a particular course.

d. Participation in the group does not result in academic credit.

Non-curriculum Related Student Groups will be permitted to use District facilities and grounds for any purpose which does not materially and substantially interfere with the orderly conduct of educational activities within the school. Furthermore, Non-curriculum Related Student Group meetings may not be directed, controlled, conducted, or regularly attended by non-school persons. Non-curriculum Related Student Group meetings must be voluntary and student initiated and may not be sponsored by the school, the government, or its agents or employees. Although a school employee, such as a teacher, may not promote, lead or participate in the

meetings, a teacher, administrator, or other school employee may be assigned to the meeting for supervisory purposes. The school District will not deny equal access or a fair opportunity to, or discriminate against, any Non-curriculum Related Student Group who wishes to conduct a meeting on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Non-curriculum Related Student Groups shall be allowed use of District facilities or grounds during normal custodial hours and during non-instructional times (i.e. time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends).

Non-curriculum Related Student Groups will be provided use of District facilities and grounds free of charge.

4. Classification – Citizen Associations

Citizen Associations are those associations organized in a non-partisan, non-sectarian, non-exclusive association for either of the following purposes:

a. The discussion of public questions, or

b. The promotion of public health by instruction in physical culture and hygiene or physical exercises.

Citizen Associations will be permitted use of District facilities or grounds for the discussion of public questions or for the promotion of public health by instruction in physical culture and hygiene or by physical exercises. All such gatherings shall be free to the public.

Citizen Associations will be permitted use of District facilities and grounds when those facilities or grounds are not being used for their prime purpose. Because the prime purpose of school property use is to promote the education, health, welfare, and personal growth of the students, Citizen Associations will not be permitted use of District facilities or grounds when those facilities or grounds are being used for the school's instructional purposes or by either School Activity Groups or School-Related Activity Groups.

The school District shall provide Citizen Associations free of charge any necessary light, heat and custodial service, and make such other provisions as are necessary for the free and convenient use of the District facilities and grounds at such times as the Citizen Association designates.

5. Recreation Department Sponsored Groups

Recreation Department Sponsored Groups are those groups which meet the stablished [sic] criteria for obtaining services and receiving Board approval for sponsorship in support of services by the Recreation Department.

Recreation Department Sponsored Groups may use the District facilities or grounds for any lawful purpose which promotes the recreation and physical fitness of the District's residents and students.

Recreation Department Sponsored Groups may use facilities and grounds during non-instructional hours and when such use does not interfere with use for school purposes or school related functions.

The use of District facilities and grounds by Recreation Department Sponsored Groups shall be Board subsidized through the Recreation Department budget. Property fees shall be waived and custodial costs shall be paid through the Recreation Department's budget.

When the group sponsored by the Recreation Department is a cooperative program, property fees shall be waived, except that organizations that have their own facilities and/or charge a participation fee will be assessed one-half of the established fee for use of the District facilities or grounds. Cooperative programs will also be assessed custodial costs.

6. Other Individuals

Other Individuals are those individuals who intend to use District facilities or grounds for lawful non-school purposes.

Other Individuals may be permitted use of District facilities or grounds for any lawful non-school purpose provided that such use is not contrary to the policies of the School Board or rules set forth in 1330 or inconsistent with the promotion of the education, health, welfare, and personal growth of the District's students as determined by the Director of Facilities Services.

Other Individuals may be permitted use of District facilities or grounds when such use does not interfere with use for school purposes or school related functions. Accordingly,

Other Individuals will always be denied access to District facilities and grounds where such facilities or grounds are reserved for use by School Activity Groups or School-Related Activity Groups. Furthermore, because the school

District is statutorily required under Section 120.12(1), Stats., to make District facilities and grounds available to Citizen Associations at such times as the association designates, Other Individuals will also be denied access to District facilities or grounds where such facilities or grounds are reserved for use by Citizen Associations.

Other Individuals may be charged a fee, not to exceed actual costs, as determined by the School Board.

7. Religious Organizations

Religious Organizations are those organizations formed for the primary purpose of promoting a devotion to a religious faith and/or an organized system of faith and worship.

Religious Organizations may use District facilities or grounds for any lawful non-school purpose provided that such use is not contrary to the rules set forth in 1330 or inconsistent with promotion of the education, health, welfare, and personal growth of the District's students as determined by the Director of Facilities Services.

Religious Organizations are permitted use of District facilities and grounds when such use does not interfere with use for school purposes or school related functions. Accordingly, Religious Organizations will be denied access to school facilities and grounds only when such facilities or grounds are reserved for use by School Activity Groups or School-Related Activity Groups. Furthermore, because the school District is statutorily required under Section 120.12(1), Stats., to make District facilities and grounds available to Citizen Associations at such times as

the association designates, Religious Organizations will also be denied access to District facilities and grounds when such facilities or grounds are reserved for the use by Citizen Associations.

In accordance with Section 120.13(17), Stats., Religious Organizations, other than Non-curriculum Related Student Groups, shall be charged a reasonable fee, not to exceed actual costs, as determined by the School Board, for use of District facilities and grounds.

(3)

No. 01-1181

Supreme Court, U.S.
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In The Supreme Court of the United States

SHARON GERNETZKE, *et al.*,

Petitioners,

V.

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO CLARIFICATION OF THE RECORD

In its Brief in Opposition (hereafter "Response"), the School District attempts to "clarify" the Statement of the Case contained in the Petition for Writ of Certiorari. Many of the attempted "clarifications" are not really clarifications at all, but are disputes in material facts or are disputes in facts that are not material to the issues in this case.

The District claims that the Bible Club knew nothing about Gernetzke's request to distribute literature, that Gernetzke made the request to distribute literature on her own behalf and that the Bible Club did not designate Gernetzke as the person to request to distribute religious literature. Response at 2-3. However, this directly contradicts statements in the record from both Gernetzke and Joseph Bezotte. In her deposition, Gernetzke was asked about her request to Principal Pulaski to distribute literature. The exchange was as follows:

> Q. Did you ask him whether you could distribute religious materials?
> A. Yes.
> Q. Did he ask you whether you wanted to distribute those on your own as opposed to on behalf of a club?
> A. Yes, and I said individually and as the club.

Gernetzke Deposition at 117. Additionally, Joseph Bezotte's deposition makes clear that Gernetzke was authorized to request for permission to distribute literature on behalf of the Bible Club.

> Q. Mr. Bezotte, I'm asking you what did Sharon - what conversations did you have with Sharon about the tracts?
> A. This is the conversation I had with Sharon.

Q. You discussed with her the fact that the Bible Club had authorized her to go?
A. Yeah....

Bezotte Deposition at 72. It is clear that Sharon had requested to distribute literature on behalf of the Bible Club and herself individually.

Additionally, The District takes issue with Petitioners' statement that Pulaski denied Gernetzke's request to distribute literature "largely because the literature was religious." Response at 2. Then the District continues in the same paragraph and admits that one of the reasons Pulaski denied the literature was because it was religious. *Id.*

Each of the other supposed "inconsistencies" or "mischaracterizations" identified by the District are either not at issue in this case or are not really mischaracterizations at all. For instance, whether the walls at Tremper were designated in 1998 or in 1995 or 1996 is immaterial. Response at 1. The fact remains that the walls were designated. Additionally, the District appears to take issue with Petitioners' statement that Pulaski is the Superintendent's designee having authority to approve/disapprove student literature requests at Tremper. Response at 4-5. However, in the same paragraph, the District admits that Policy 2440 gives Pulaski the discretion to make a professional judgment with regard to literature distribution on his campus. *Id.* at 5. Pulaski was also asked in deposition "And with regards to whether you can make a decision on the distribution of literature, would you agree that, as a Principal, you would be a designee of Dr. Johnson to make that decision on your campus?" to which Pulaski replied, "That is my understanding." Pulaski deposition at 44-45. The fact remains that Pulaski has been designated to make decisions about literature distribution on his campus and that the Board has given him that authority.

ARGUMENT

I. THE ISSUES RAISED IN THE PETITION FOR CERTIORARI ARE PROPERLY BEFORE THE COURT

The District argues that Issues Number 1 - 3 are not properly before the Court because they were not raised in the Court of Appeals. However, the District significantly overlooks the fact that these issues raised in the Petition were grounds of error asserted by the Petitioners related to the Seventh Circuit's opinion in this case. Each of the issues raised were errors committed by the Seventh Circuit.

This Court has stated, "The standard we have previously employed is that we will not review a question not pressed *or* passed on by the courts below. Here, the Court of Appeals expressly ruled on the question, in an appropriate exercise of its appellate jurisdiction; it is therefore entirely proper in light of our precedents for the Court to reach the question on which it granted certiorari." *U.S. v. Williams*, 504 U.S. 36, 42-43 (1992)(*quoting Springfield v. Kibbe*, 480 U.S. 257, 266 (1987)(dissenting opinion))(emphasis in original). "We have never suggested that the jurisdictional stipulations of §1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below... *Parties are not confined to the same arguments which were advanced in the courts below upon a federal question there discussed.*" *Illinois v. Gates*, 462 U.S. 213, 248 (1983)(White, J., concurring)(*quoting Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899))(emphasis in original). This Court's settled practice is to consider questions either pressed by a petitioner below or passed upon by a court below. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

The District argues that Issue number one relating to whether *Monell v. Dep't. of Social Services*, 436 U.S. 658 (1978) applies to an action brought against a governmental official for prospective relief only was not properly asserted in the courts below and has been waived. However, the Seventh Circuit made it very clear in its opinion that the result in this case might have been different if *Monell* only applied to the damages claim brought by Petitioners and not the claims for prospective relief. Indeed, the entire underpinning of the *Monell* issue before the Court would be different if *Monell* only applied to damages claims. The *Monell* issue has always been before the courts in this case. Petitioners are merely raising an argument regarding this issue that was, importantly, used as the basis for finding against the Petitioners in the Seventh Circuit.

Additionally, the District argues that Issue number two was never *argued* below by the Petitioners. *See* Response at 7. Again, the *Monell* issue was always before the courts below, and petitioners are merely *arguing* here that *Monell* should be readdressed in light of the Court of Appeals holding. *"Parties are not confined to the same arguments which were advanced in the courts below upon a federal question there discussed."* *Gates*, 462 U.S. at 248 (White, J., concurring)(emphasis in original). Additionally, it would make no sense to argue to the appeals court that *Monell* should be readdressed. *Monell* is binding precedent that the Seventh Circuit was obligated to follow absent any contrary opinion from this Court. The proper forum to argue for the readdressing of a binding Supreme Court precedent is in the Supreme Court.

Finally, the District argues that Issue number three regarding the incorporation of a "heckler's veto" into the Equal Access Act was never argued below and that Petitioners never argued below that the mural must materially and substantially interfere with school discipline before it could be censored. *See*

Response at 8. However, the Seventh Circuit clearly relied on a "heckler's veto" in its opinion denying the Bible Club mural. App. 3a-4a. The Seventh Circuit clearly and unambiguously stated that the "heckler's veto" rejected by the First Amendment "has not been carried over into the Equal Access Act." App. 3a. The Seventh Circuit then used this "heckler's veto" to insulate from liability the principal's decision to forbid the display of the cross which was based on his fear that a lawsuit might be brought because of the cross and that the cross would incite conflicts among students. App. 3a. Therefore, it is clear that this "heckler's veto" was clearly a basis for the Seventh Circuit's opinion. Petitioners have every right to argue that this basis for the opinion is incorrect and urge for its reversal. Each of the issues presented to the Court in the Petition for Writ of Certiorari are properly before the Court.

II. PETITIONERS' CLAIMS ARE NOT MOOT

The District argues that Petitioners' claims are moot because Gernetzke has graduated and Bezotte will graduate soon. Response at 9. Interestingly, the District only makes this argument with regard to Issue Number one presented by the Petition relating to whether *Monell* applies to claims for injunctive relief.[1] However, this issue is not moot.

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[1] Nowhere else in its Response does the District argue mootness. Therefore, the District concedes that at least with regard to each of the other issues raised by Petitioners, there are no mootness issues. Nor could there be a mootness issue with regard to these other claims. It is well settled that a damages claim saves a Plaintiff's case from mootness. *See Buckhannon Bd. & Care Home, Inc. v. Dep't. of Health & Human Services*, 532 U.S. 598, 608-09 (2001); *see also Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002)(stating that a claim for damages, even nominal damages, saves a case from mootness); *Beyah v. Coughlin*, 789 F.2d 986, 989 (2d Cir. 1986)(holding that a Plaintiff's

As stated earlier, Sharon Gernetzke was authorized by the Bible Club to request permission to distribute literature and that the request was made both individually and on behalf of the Bible Club. *See* Gernetzke Deposition at 117; Bezotte Deposition at 72. Because this request was made on behalf of the Bible Club and the Bible Club authorized Sharon Gernetzke to make this request, the issue is not moot. This Court has recognized an exception to its mootness doctrine for cases presenting issues that are "capable of repetition, yet evading review." *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 399-400 (1975). This exception is limited to situations where the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and there is a reasonable expectation that the same complaining party would be subjected to the same action again. *See Weinstein v. Bradford*, 423 U.S. 147, 148-49 (1975). Both elements are present in this case.

The Bible Club continues at Tremper High to this day. The Bible Club members are still subject to the restrictions complained of by the Petitioners. Indeed, because the Bible Club members authorized and were part of the request to distribute literature, this issue will arise again with the Bible Club members. While the Bible Club itself was not a party to this case, it is clear in the record that Sharon Gernetzke and Joseph Bezotte were acting on behalf of the Bible Club members as well as themselves in requesting to distribute literature. Because this was not just an individual request to distribute literature, but also a group request on behalf of and authorized by the Bible Club, the issue was squarely before the courts below and survives to this day. Additionally, should the Bible Club members seek to distribute

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claims for nominal damages precluded a mootness argument); *O'Connor v. City and Cty. of Denver*, 894 F.2d 1210, 1215-16 (10th Cir. 1990)(holding a claim for nominal damages was not moot). Because Petitioners have advanced a damages claim, mootness is not an issue.

literature and be denied, they too will likely graduate before a final decision has been obtained. The same issue will happen to the same people in the future yet will be denied review because of graduation. This clearly meets the elements for an exception to the mootness doctrine. "There would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if [this Court] should fail to resolve the constitutional issues...." *Norman v. Reed*, 502 U.S. 279, 287 (1992).

III. THERE IS A CONFLICT BETWEEN THE SEVENTH AND NINTH CIRCUITS REGARDING THE APPLICATION OF *MONELL*

The District argues that there is no conflict between the Seventh and Ninth Circuits regarding the application of *Monell* to the present case. It attempts to distinguish the Ninth Circuit's decision in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989) from the Seventh Circuit's decision in this case by stating that the *Chaloux* case involved only a claim for injunctive relief whereas this case involves a claim for both damages and injunctive relief. The District argues that the present case is different because *Chaloux* and its progeny involve solely claims for prospective relief. However, this attempt to distinguish *Chaloux* is misplaced and does nothing to alleviate the split among the circuits on the issue whether *Monell* only applies to suits for damages.

The operative and meaningful fact that clearly demonstrates the circuit split is that Petitioners' complaint in this case did contain a claim for injunctive relief. Therefore, the district court and the Seventh Circuit had, as an option, the ability to grant solely prospective relief as opposed to damages. This should be distinguished from a case that contained solely a claim for damages and yet the plaintiff argued that the court should have

awarded injunctive relief if it did not find a custom, policy or practice pursuant to *Monell*. That is not the case here. Petitioners clearly requested prospective injunctive relief. Therefore, the court could have awarded the injunctive relief and denied the damages under the *Chaloux* theory. The Seventh Circuit did not do so. This is error and is clearly at odds with the Ninth Circuit. This Court should resolve this conflict.

IV. RESPONDENTS' *MONELL* ARGUMENT ILLUSTRATES WHY THAT CASE SHOULD BE READDRESSED

Petitioners have argued that *Monell* should be readdressed to impose *respondeat superior* liability at least in the certain situation where there has been a clear grant of authority by a governmental entity to an official. In that instance, petitioners have argued that it makes no sense and indeed leads to inequitable results to deny *respondeat superior* liability. In response, the District argues that it falls squarely outside of *Monell's* requirement of a custom, policy or practice and, therefore, the Seventh Circuit committed no error justifying review by this Court. However, the District's argument makes Petitioners' case for readdressing *Monell*. The District states in its Response:

> The District does not consent to the imposition of *respondeat superior* liability under Policy 2440 by granting Dr. Johnson/his designees to "use professional judgment" in situations where there is no applicable District policy. Contrarily, if Johnson or his designees exercise their professional judgment in an unconstitutional manner, this Court has stated that the District would not automatically be liable under §1983, for liability would then rest on *respondeat superior*.

Response at 14-15. The District thus admits that it can grant authority to certain employees to act in absence of District Policy yet it can then stand back and remain insulated form liability when that employee acts unconstitutionally. The District argues that it has the best of both worlds. This inequity was never intended nor desired by *Monell* nor by §1983. *Monell* should be readdressed by this Court to impose *respondeat superior* liability in instances such as this.

V. THE EQUAL ACCESS ACT WAS INCORRECTLY INTERPRETED BY THE SEVENTH CIRCUIT

Finally, the District argues that the Equal Access Act was not interpreted to incorporate a "heckler's veto" into the Act and that the Act was interpreted consistently with Supreme Court precedent. It is difficult to understand how the District can argue that a "heckler's veto" was not incorporated into the Act by the Seventh Circuit when that court stated that, "The principal's decision to forbid the display of the cross was in any event insulated from liability under the Act by [§4071(f)]." App. 3a. The Seventh Circuit then stated that the prohibition on a "heckler's veto" in the First Amendment had not been incorporated into the Act. The Seventh Circuit most certainly expanded the Equal Access Act in ways it was never intended.

Additionally, the District's argument that this Court applied a "modified heckler's veto" in *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001), cannot be farther from the truth. Twice the District argues that the Seventh Circuit's interpretation of the Equal Access Act is consistent with *Good News Club* because that case, in the District's estimation, used a "modified heckler's veto" to proscribe religious conduct perceived by others as a possible Establishment Clause violation. *See* response at 22 n.9, 25-26. However, if the District had bothered

to read the whole sentence they quote from the *Good News Club* case, it would have clearly read that this Court stated, "**We decline to employ Establishment Clause jurisprudence using a modified heckler's veto,** in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Good News Club*, 533 U.S. at 119 (emphasis added).

All of the District's other arguments regarding the Equal Access Act relate to its belief that allowing a cross on the wall would cause a person to believe the cross bore the imprimatur of the school in violation of the Establishment Clause. Response at 23, 28-30. However, this argument has been soundly rejected by this Court in *Good News Club,* as quoted above. Therefore, the District is advancing an argument that is inconsistent with this Court's precedent. As the Seventh Circuit's opinion was also inconsistent with *Good News Club* and this Court's clear refusal to proscribe religious conduct under the Establishment Clause based on possible misperceptions of others, this Court should grant certiorari to resolve this inconsistency.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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